UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

In the Matter of:

CHALLENGE MFG. COMPANY, LLC,

Respondent,

and Case No. 07-CA-199352

MICHAEL DANIEL KILISZEWSKI,

Charging Party.

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RESPONDENT CHALLENGE MANUFACTURING COMPANY'S POST-HEARING BRIEF

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INTRODUCTION

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These are the words of Norma Sanchez. She wrote them in an email she sent on Saturday, May 6, 2017 to eight Challenge Manufacturing managers and supervisors, including Challenge's nationwide Vice President of Operations, and both the HR and Plant Managers for the facility in which she worked. In her email, she described being subjected to a profane tirade by maintenance technician Mike Kiliszewski simply because she told him to fix a broken machine. She concluded her email by stating "I would like for this behavior from Mike to stop."

This was the first complaint Ms. Sanchez made during her four-year tenure at Challenge. In her experience, this was so extreme that in her words it made her feel "scared" and "really bad, like really bad because I was just trying to do my job." She had never been "cussed at" like that before while working at Challenge.

Upon receipt of Ms. Sanchez's complaint, Challenge's HR staff began conducting a comprehensive investigation, which included interviews with ten eye-witnesses to the incident on the night of May 5 between Mr. Kiliszewski and Ms. Sanchez. Mr. Kiliszewski was

interviewed as part of this investigation, and he voluntarily produced to Challenge a pre-written statement intended to serve as a rebuttal to every allegation in Ms. Sanchez's email.

But in his rebuttal, Mr. Kiliszewski did not deny that the alleged confrontation occurred. Further, he did not deny he had refused to fix the machine Ms. Sanchez asked him to repair. Worse still, he admitted that he had sworn at her, told her to "get the hell away" from him, rhetorically asked her "where's your fucking second shift maintenance guy?" and told Ms. Sanchez that he didn't "take orders from [you,] only requests." Mr. Kiliszewski, in his statement, tried to justify his conduct towards Ms. Sanchez because "respect isn't given, it's earned." After reviewing these admissions in light of all other available evidence (and also referring to multiple witness statements collected over the course of the investigation), Challenge's Vice President of Operations Keith O'Brien decided to terminate Mr. Kiliszewski's employment because "we couldn't continue to tolerate that type of behavior happening on our premises moving forward." On the whole, Mr. O'Brien concluded that Norma's account was believable, and Mr. Kiliszewski's conduct was unacceptable.

What Mr. O'Brien didn't consider was whether or not Mr. Kiliszewski engaged in union activity during his employment at Challenge, or whether Mr. Kiliszewski supported the UAW, the labor union that was in the process of organizing Challenge's eight manufacturing facilities across the country. There were two reasons Mr. O'Brien didn't consider such union activity (apart from such activity being an unlawful reason for discharge prohibited by the Act). First, Mr. O'Brien had neither actual nor constructive knowledge about Mr. Kiliszewski's support for the UAW at the time he made the decision to fire him. Maybe former members of Challenge's membership had known about Mr. Kiliszewski's vocal support for the UAW during

previous UAW organization drives at Challenge in 2010, 2013, and 2015, but Mr. O'Brien, who was an external hire into Challenge in 2016, had never heard any such rumors.

More fundamentally, however, Mr. O'Brien would not have cared that Mr. Kiliszewski supported the UAW even if he had known. The unusual facts of this case prove that assertion. Challenge and the UAW became partners to a broad, nationwide neutrality agreement in May of 2016. Under the terms of that neutrality agreement, Challenge agreed to conduct no union avoidance campaign, to extend recognition in each of its plants upon submission of proof of majority support through card check, and to promptly bargain collective bargaining agreements with each newly-recognized unit on a plant-by-plant basis. And there has been no allegation that Challenge ever went back on the promises it made through that Agreement; under Mr. O'Brien's short tenure as VP of Operations, Challenge voluntarily extended recognition in four of its eight facilities, had successfully ratified four collective bargaining agreements with the UAW, and was in the midst of negotiating another at Challenge's Pontiac location when Mr. Kiliszewski was fired. Put simply, Challenge lacked the motivation to discriminate against Mr. Kiliszewski for supporting the UAW – Challenge's historical position of opposition towards the union stopped the day the 2016 Neutrality Agreement was signed.

Nevertheless, Mr. Kiliszewski and the General Counsel allege in this case that Challenge terminated Mr. Kiliszewski's employment because of his union activity, or for his general support for the UAW, in violation of Section 8(a)(3) of the National Labor Relations Act. The charge is meritless, and should be dismissed for each of the following, independent reasons:

- Neither Mr. O'Brien nor Ms. Sanchez knew about Mr. Kiliszewski's support for the Union, and the general knowledge about Mr. Kiliszewski's historical support for the UAW cannot be imputed to either Challenge supervisor under the circumstances.
- The General Counsel cannot meet its burden of proving that Challenge held union animus in this case. The Supreme Court has been clear. To violate the Act, a necessary element is that the employer discharge the employee to "discourage membership" in the union. *See, e.g., Radio Officers v. NLRB,* 347 U.S. 17, 42-43 (1954). Yet, the allegation that Challenge harbored union animus is extremely untenable in the context of this case. Challenge has partnered with the UAW pursuant to a nationwide neutrality agreement, under which the UAW has organized the majority Challenge's plants and bargained all four collective bargaining agreements. The UAW also has neither joined Mr. Kiliszewski in the prosecution of this charge, nor did they bring any charge of their own concerning Challenge's decision to terminate him. Moreover, the General Counsel's only evidence of union animus comes from a single, disputed, and innocuous statement allegedly made by one Challenge supervisor to another: that Mr. Kiliszewski "was being watched" because of his union activity. The witness who allegedly made this statement denies saying so with no motive to be dishonest. And the record proves that all observation of union activity was motivated not by union animus, but by Challenge's desire to ensure that both the union and Challenge's own supervisors were complying with the terms of the Neutrality Agreement. Accordingly, the General Counsel has not met its prima facie burden that Challenge discharged Mr. Kiliszewski to discourage membership in the UAW.
- Even if the General Counsel was able to prove its prima facie case, Challenge successfully carried its own evidentiary burden by proving that it would have terminated Mr.

Kiliszewski's employment even absent his support for the UAW. Challenge carried out a thorough and comprehensive investigation after it received Ms. Sanchez's emailed complaint, and during that investigation Mr. Kiliszewski admitted he used language against Ms. Sanchez that was profane, derogatory, and disrespectful; admitted that he refused to do the work she instructed him to perform; and failed to take any accountability for his actions. Further, none of the excuses he offered (either during the investigation or subsequent to it) in an attempt to justify his conduct were exculpatory. Under the circumstances, Challenge was left with little choice but to terminate Mr. Kiliszewski's employment. Ms. Sanchez felt intimidated, scared and "really, really bad" and Challenge concluded that there was reason to believe that if Mr. Kiliszewski was returned to work, faced with similar circumstances he would repeat the conduct.

- There is no evidence suggesting that Challenge's rationale for terminating Mr. Kiliszewski's employment is pretextual. The General Counsel failed to demonstrate that any similarly-situated employee who engaged in the same conduct was treated differently. Also, the record contains evidence demonstrating that Challenge has terminated employees for directing profanity against co-workers or supervisors and for insubordination in the past. Further, both Mr. Kiliszewski and some of his co-workers who also supported the UAW during prior organization campaigns were never previously disciplined by Challenge, even though Challenge knew about their pro-union conduct.
- Mr. Kiliszewski's profane and egregious conduct towards Ms. Sanchez removed him from the protections of the Act. Challenge's legal and ethical obligations requires it to maintain a workplace that is free of unlawful harassment to the maximum possible extent. Continuing Mr. Kiliszewski's employment is contrary to those obligations.

For each of these reasons, Mr. Kiliszewski's Section 8(a)(3) claims against Challenge must be dismissed in full and with prejudice.

STATEMENT OF FACTS

A. Background

Challenge Manufacturing is a Tier 1 automobile component manufacturer and supplier. Challenge specializes in creating and producing superior structural and safety components for a wide variety of different consumer and commercial vehicles. (Tr. v.2 at 254[1]). It operates manufacturing facilities both nationwide and globally, and is one of the largest employee-owned companies in the United States. (*Id.*).

Challenge operates eight manufacturing facilities in the United States. (Tr. v.2 at 383). Each of the eight facilities is assigned a particular number – Plants 1, 2, and 3 are all located in Walker, Michigan; Plant 4 is located in Holland, Michigan; Plant 5 is in St. Louis; Plant 6 is in Irving, Texas; Plant 7 is in Kansas City, Missouri; and Plant 8 is in Pontiac, Michigan. (Tr. v.2 at 254). Of these facilities, Plant 4 in Holland is one of the largest. The Holland facility is 600,000 square feet in size, and employs one thousand employees at full capacity. (Tr. v.2 at 384). These employees are organized across three shifts, which produce parts around the clock. Due in part to the size of the facility as compared with the population of the City of Holland itself, Plant 4's workforce is extremely diverse. (*Id.*). As Keith O'Brien, Challenge's Vice President of Operations testified during the hearing, Plant 4 is "a small city" with a workforce comprised of "[e]very race, gender, ethnicity; it's there." (Tr. v.2 at 385).

As with many automotive manufacturing facilities across the country, Plant 4 is characterized by its extraordinarily high employee turnover rate. (Tr. v.2 at 254). As Mike

[1] Citations to the hearing transcript are designated with a Tr., followed by the volume number and the page number. The referenced citation, for example, refers to cited testimony appearing on page 254 of volume 2 of the transcript.

Tomko, Vice President of Human Resources, explained at the hearing, the Holland plant's 2017 turnover "was 200 percent, meaning out of the entire population of employees, we cycled through two times that number of people both voluntarily and involuntarily. That consists of full-time regular employees along with temporary agency employees that are eligible to become full-time employees. That's our hiring practice." (Tr. v.2 at 254-255).

B. The History of Union Activity at Challenge

Throughout most of its history, none of Challenge's domestic manufacturing facilities were unionized. Beginning in 2010 at the latest, however, union activity began occurring in some of Challenge's facilities. (Tr. v.1 at 152). In Challenge's Holland facility, for example, employees engaged in organizing drives in 2010, 2013, and 2015 after contacting the United Auto Workers ("UAW") for the purpose of coordination and support. (Tr. v.1 at 18; 152). The 2015 organizing drive developed to the point that approximately thirty-five Challenge employees signed a letter of intent and presented it to the Holland facility's plant manager, expressing their desire to be represented by the UAW. (Tr. v.1 at 20; GC Ex. 2).

Mike Kiliszewski, the Charging Party in this case, was an integral part of leading the UAW's organization efforts at the Holland plant. As Mr. Kiliszewski testified during the hearing, the 2013 organizational campaign began after he "contacted the UAW with interest in forming a union." (Tr. v.1 at 18). Mr. Kiliszewski testified that he was involved in "a couple" of meetings during this campaign, and also orchestrated the signing of authorization cards. (*Id.*). Although the 2013 organizational campaign was ultimately unsuccessful, Mr. Kiliszewski renewed his efforts in 2015 and reached out to the UAW again, scheduled UAW-sponsored meetings, collected authorization cards, and talked to a "couple of hundred" Challenge employees about the Union in the Holland plant. (Tr. v.1 at 19-20). He testified that Challenge's supervisors and managers knew about his support for the UAW and his involvement

in at least the 2015 campaign, allegedly because he "wore UAW paraphernalia [and] shirts, [] had stickers, [and] wore hats." (Tr. v.1 at 20). Mr. Kiliszewski also was one of the employee signatories to the 2015 letter of intent. (Tr. v.1 at 21). Eric Mathews, one of Mr. Kiliszewski's co-workers, one of Mr. Kiliszewski's friends, and a fellow maintenance technician, testified that he also participated in the UAW's organizing campaign in Holland during 2015. (Tr. v.1 at 94; 153). Mr. Mathews also signed the letter of intent that year, informing Challenge's management that he was part of the UAW organizing efforts. (*Id.*).

Challenge initially elected to oppose the UAW's organizing drives. During the 2015 organizing campaign at the Holland facility, for example, Challenge conducted an oppositional campaign. (Tr. v.1 at 21). This campaign included promulgation of literature intended to persuade Challenge's employees not to vote to unionize. (GC Ex 14). The UAW's 2015 campaign was ultimately unsuccessful.

C. Challenge and the UAW Execute a Neutrality Agreement

But Challenge's labor relations strategy changed shortly after the UAW won an election to represent employees at Plant 5 in St. Louis, which ended up being Challenge's first unionized facility in the United States. (Tr. v.2 at 255). Diverging from its former position of union avoidance, Challenge and the UAW negotiated and executed a nationwide neutrality agreement in May of 2016. (Tr. v.2 at 257; R Ex 5). The purpose of the 2016 Neutrality Agreement, as stated on its face, was to "enhance an efficient organizing process and maintain stable labor relations." (R Ex 5 at 1).

The 2016 Neutrality Agreement was designed to create an overall atmosphere "of mutual respect" between Challenge and the UAW and would, by its terms, cover any attempt by the UAW to represent employees at any of Challenge's eight manufacturing facilities across the country. The Agreement created a "constructive relationship" between Challenge and the UAW,

and provided the UAW with broad and far-reaching access into Challenge's facilities. (R Ex 5, ¶ 1(b)). Pursuant to the terms, Challenge agreed to the following conditions, all of which granted the UAW and employees who supported the UAW far greater rights than those statutory protections provided by law:

- Challenge's promise to "not engage in any communication or conduct which, directly or indirectly, demonstrates or implies opposition to unionization of its employees or to the UAW" (See R Ex 5, ¶ 1(a));
- Challenge's agreement to provide the UAW with a comprehensive list of all production and maintenance employees in each facility upon request (See R Ex 5, ¶ 2);
- An entitlement for the UAW to enter employee break rooms at each of Challenge's eight facilities with 48 hours of notice for the purpose of speaking with employees (See R Ex 5, ¶ 3);
- A one-time opportunity for the UAW to enter each facility and conduct a 40-minute meeting with all assembled Challenge employees during paid, working time, and in the absence of any Challenge managers or supervisors (See R Ex 5, ¶ 4);
- Challenge's agreement to extend recognition to the UAW upon demonstration that a simple majority of Challenge's employees support the Union as established by a card check without holding an official election (See R Ex 5, ¶ 5-6); and
- The obligation to commence bargaining with the UAW after certification of majority status (See R Ex 5, ¶ 7).

In exchange, "[t]he UAW and the Company agree[d] that a new organization campaign will not commence at a new facility owned by the Company until ratification is reached at the previously

organized facility." (See R Ex 5, ¶ 9) (emphasis added). This particular provision meant that the UAW agreed "to only organize one facility at a time, and not to commence another activity until ratification [of a collective bargaining agreement] has been completed at the location that they're currently bargaining." (Tr. v.2 at 259). Mr. Mathews, who was involved in several UAW campaigns, concurred in this assessment – he testified that Challenge's neutrality agreement with the Union meant that the UAW "only could work from one shop at a time." (Tr. v.1 at 155). The neutrality agreement was slated to last for no shorter period of time than two years following ratification, after which time either party could unilaterally terminate it. (R Ex 5, ¶ 8).

It is uncontested that both Challenge and the UAW adhered to the terms of the 2016 Neutrality Agreement for a period of time following its execution. Following Challenge's extension of recognition to the UAW at the Irving, Texas plant, the parties successfully ratified a collective bargaining agreement covering that facility following negotiations, which began in October of 2016. (Tr. v.2 at 255). The UAW was also recognized as the exclusive bargaining representative for covered employees at Challenge's Kansas City, Pontiac, and Walker Plant 3 facilities in the following months. (Tr. v.2 at 256). The parties also successfully negotiated CBAs in each of those facilities, except that the parties remained in negotiations in Plant 3 as of the date of the hearing. (*Id.*).

D. Organizational Activity Occurs in Holland in 2017

During early 2017, Challenge and the UAW were in the process of negotiating a collective bargaining agreement at Plant 8 in Pontiac, Michigan. (Tr. v.2 at 259). But despite the 2016 Neutrality Agreement's prohibition on simultaneous union activity in multiple facilities, Mr. Kiliszewski admitted that he and other Challenge employees engaged in organizational

activity in Holland during "sometime in March or April" even as Challenge and the UAW bargained a contract across the state in Plant 8.[2] (Tr. v.1 at 26). As Mr. Kiliszewski testified:

> We contacted Danny Trull [the UAW's lead organizer] and Espiranza in regards that the other plants down south and the Pontiac plant were UAW and we wanted to know whether or not the Holland plant was coming up.

(*Id.*). Mr. Kiliszewski facilitated card signing, held "a couple of meetings," discussed the UAW with Challenge employees in Holland, wore UAW shits and hats, and affixed skilled trades UAW stickers to his toolbox. (Tr. v.1 at 26-27). Mr. Mathews was also involved with "start[ing the] campaign." (Tr. v.1 at 155). Mr. Kiliszewski acknowledged that he knew of the existence of the 2016 Neutrality Agreement at the time he engaged in this conduct. (Tr. v.1 at 27).

Challenge became aware that this organizing activity was occurring in the Holland facility sometime in April of 2017. (Tr. v.2 at 259). Challenge was concerned about this activity - not because it was pro-UAW or in furtherance of organization of the plant, but because "it was a very clear breach of the neutrality agreement." (Tr. v.2 at 260). The UAW had agreed to not begin any organizing activities at the two remaining non-union facilities until after negotiations were concluded in Pontiac.

In response, Challenge first took steps to ensure that all of its managers and supervisors were complying strictly with the terms of the 2016 Neutrality Agreement and with the statutory requirements of the NLRA more generally. In this respect, Challenge's response to the allegations of union activity differed starkly from previous campaigns – Challenge took no steps to oppose the activity by engaging in union avoidance of its own due to the terms of the Agreement. As Mr. Tomko testified:

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[2] Challenge and the UAW reached a collective bargaining agreement covering the Pontiac facility on June 6, 2016. (Tr. v.2 at 260).

> Q: And when Challenge became aware in April 2017 that there was organizing going on in Holland, did you do anything in the plant?
>
> A: Yes. We conducted a management training session, awareness training of the neutrality agreement, along with the responsibilities that the leadership team has as it relates to the NLRA.
>
> Q: You say the neutrality agreement... What did you say to the managers about the neutrality agreement?
>
> A: Well, we explained basically the highlights of the neutrality agreement, that the neutrality agreement exists, and that if employees ask supervisors or managers what their opinion is or what they think of it, that they're supposed to say we have a neutrality agreement with the UAW, and this is your decision, this is your choice, and we're not going to be involved.
>
> Q: Were they instructed not to say anything negative about the UAW?
>
> A: Yes, they were instructed not to say anything negative.

(Tr. v.2 at 260-261). Mr. Tomko testified that he believed this training occurred on or around April 21, 2017. (Tr. v.2 at 269).

E. Carl Leadingham is Accused of Acting Contrary to Challenge's Management Training

Shortly after Mr. Tomko conducted his training sessions with Challenge's supervisory staff, several management employees began to submit reports to HR when they observed organizational conduct occurring on the shop floor that could have violated the terms of the 2016 Neutrality Agreement. As Mr. Tomko testified, these reports were filed because Challenge was "gathering information as it relates to a breach of the neutrality agreement," because "[f]or the UAW to commence an organizing campaign while we were in the middle of negotiating a collective bargaining agreement in Pontiac was certainly a clear violation of the neutrality agreement." (Tr. v.2 at 272-273). Two such examples of conduct which might provide evidence of a breach were submitted by Maintenance Supervisor Craig Ritter, who

reported to Challenge's HR that organizational activity may have been occurring in the Holland plant. (GC Ex 20). Specifically, Mr. Ritter stated that he had heard rumors[3] on the shop floor that Mr. Kiliszewski was distributing authorization cards and holding off-site organizational meetings with employees. Mr. Ritter specified in his statements that this "was information passed on to me but not witnessed by me."[4] (GC Ex 20). More notably, however, Mr. Ritter reported that Challenge Group Leader Carl Leadingham may have been involved in conducting this UAW activity.

Mr. Leadingham's alleged participation in organizational activities was significant not because Challenge intended to oppose future attempts on the part of the UAW to organize the Holland plant, but because of Mr. Leadingham's position and status with Challenge. As Mr. Tomko explained during the hearing:

> Obviously, because of the neutrality agreement, we were very concerned that Carl Leadingham was allegedly participating in UAW meetings. That would be a violation of our neutrality agreement, as well as a violation of the National Labor Relations Act because [Carl is] a supervisor.[5]

(Tr. v.2 at 267). As Mr. Tomko reiterated on cross, this was significant due to "the fact that this says Carl Leadingham, who was a supervisor, I think it was important for us to know because that flew in the face of the training that we provided our leadership." (Tr. v.2 at 272).

Accordingly, Mr. Tomko suspended Mr. Leadingham pending investigation on April 25, 2017. (Tr. v.1 at 134). As part of the investigation, Mr. Tomko "questioned [Carl] about his involvement, and he denied any involvement." (Tr. v.2 at 267). Mr. Leadingham

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[3] Although Mr. Ritter filed his reports on April 28 and May 1 of 2017, his April 28 report demonstrates that he heard rumors about Mr. Leadingham's involvement with distributing UAW authorization cards the prior week. (GC Ex 20).

[4] Mr. Kiliszewski's own testimony during the hearing proves that these rumors were true. (Tr. v.1 at 26-27).

[5] Although Mr. Leadingham protested his status as a supervisor on occasion, Challenge introduced documentation at the hearing proving that he was so classified. (R Ex 33). Ms. Compeau also testified that Mr. Leadingham was made a supervisor as of November 21, 2016. Moreover, the parties stipulated to his supervisory status.

prepared a witness statement as part of this investigation, in which he stated that he had been "falsely" accused of involvement with the UAW. (R. Ex 34).[6] Challenge investigated the matter and ultimately concluded that Mr. Leadingham never participated in any insubordinate conduct because Mr. Tomko "found him to be credible" "after talking to him... He denied all the allegations. We couldn't prove otherwise." (Tr. v.1 at 268). Challenge lifted Mr. Leadingham's suspension and provided back pay for all the scheduled shifts he had missed during his suspension. (*Id.*). Mr. Tomko testified that "there's nothing in his file about this. He was cleared." (*Id.*).

F. Challenge Notifies the UAW that the 2016 Neutrality Agreement Had Been Violated

Shortly after Challenge conducted the management training sessions, Challenge also contacted the UAW about the breach. (Tr. v.2 at 259). Mr. Mathews testified that the UAW responded by instructing the Challenge employees conducting the organizational campaign in the Holland plant to cease their organizational activity. (Tr. v.1 at 164). As Mr. Matthews explained, this was "due to the Company's agreements with the Union... so we had to cancel our activity there at Plant 4." (Tr. v.1 at 155).

Based on the breach, the UAW and Challenge met about the 2016 Neutrality Agreement. (Tr. v.2 at 261-263). Those meetings resulted in an amendment to the Agreement dated September 15, 2017. The preamble specifically verifies the amendment was bargained due to "various issues that have arisen during the implementation" of the 2016 Neutrality Agreement. (R Ex 6). The Amendment also specifically contains provisions addressing organizational

[6] Mr. Leadingham admitted during his testimony at the hearing that he did in fact talk to other employees about the UAW in derogation of Challenge's supervisor training (Tr. v.1 at 135). This demonstrates Mr. Leadingham's willingness to disregard the truth, and undermines his credibility as a witness.

activity which was slated to occur at the Holland facility. (See R Ex at ¶6). The Amendment extended the neutrality agreement until at least October of 2018.[7]

G. Norma Sanchez Speaks Up

Keith O'Brien, Challenge's Vice President of Operations, woke up around 6 AM on Saturday, May 6, 2017. (Tr. v.2 at 388). He checked his work email account, and read an email message from Norma Sanchez, a Production Supervisor working the second shift at Challenge's Holland facility. (*Id.*). Ms. Sanchez had emailed Mr. O'Brien (along with Challenge HR Supervisor Darlene Compeau, Maintenance Supervisor Jeff Glover, Production Supervisor Joe Maynard, third shift Maintenance Manager Larry Boyer, second shift Production Superintendent Tom Phipps, and several other management employees) at 1:08 AM that morning. (R Ex 8).

> Subject: Mike Kiliszewski
>
> I continue to have issues with Mike Kiliszewski. I have addressed my concerns with Larry Boyer and not much has changed. Today around 10:00 PM I asked Mike to come to restart w079 [a machine in Area 1]. Mike was in the area 1 maintenance area talking with another maintenance person… After around 10 minutes, w079 was still down and I went to Mike still [in] the maintenance area talking. I said Mike I need you to go fix 79. Mike screamed[8] to me Where's your fucking 2nd shift maintenance guy? I told him that they were working in other cells… I told Mike this is why I'm asking you. Mike said You're not my boss, you don't tell me what to do. Then he told me to get the fuck out [of] his face… As I walked away Mike yelled Fuck you bitch. I feel Mike tries to intimidate me when I ask him for help. I find Mike to be very disrespectful to me and I am afraid to ask for help because he give me bad attitude. I have a witness statement from an employee who also heard Mike call me names… I would like for this behavior from Mike to stop.

[7] As argued in greater detail in Section C of the Argument section below, this undisputed cooperation between the UAW and Challenge severely undercuts the General Counsel's ability to prove that Challenge harbored union animus in this case.

[8] Ms. Sanchez clarified that Mr. Kiliszewski "was shouting. Like he was not talking normal. Like he was just – he's raised his voice to me" "[r]eally loud." (Tr. v.2 at 222).

(R Ex 8) (emphasis added).

At the hearing (which was held over a year after she sent her emailed complaint to Challenge), Ms. Sanchez's testimony was entirely consistent with her nearly-contemporaneous description[9] of the event:

> Q: [] Could you please tell the Administrative Law Judge what happened that evening at work?
>
> A: Okay. I was at work. I was in my area. And one of my employees came in and asked me that he needed maintenance for welder 79. I went in for maintenance. My maintenance for second shift was busy working in another cell, so I seek Mike [Kiliszewski]. I see him in area 1 maintenance area, and I went and asked for help. I ask him if he can come and fix 79, welder 79. And then I walk away.
>
> And then I went around my area. Second time I came and I told Mike 79 still down, I need [you] to go and come fix 79. And he said 'Where's your fucking second shift maintenance guy.' I said 'they're working in other cells, 89, 108, and []8 that was down, and my second shift maintenance was working on those cells, 'that's why I'm asking you for help, Mike.' And then he told me 'you're not my boss. You don't tell me what to do.' And I said, 'well, I need you to come and fix my machine, my welder.' And he said 'get the fuck out of my face.' And I say 'I'm going to go tell your boss.' When I was walking away, he said 'fuck you, bitch.' And then I just went and looked for his boss.
>
> ...
>
> Q: But after you walked away, did you report the incident?
>
> A: Yes. I went and talked to [Mr. Kiliszewski's] boss, Larry Boyer.
>
> Q: Okay.
>
> A: And I went and talked to him, and I tell him what's happened. And then I decide to write a statement and send it to HR, to my boss, my boss Dean [Bettendorf] and other people.

[9] During the hearing, Ms. Sanchez offered the testimony quoted below prior to being directed to review (R Ex 8). In other words, she testified about the incident from her memory and without aid of her May 6 emailed statement.

(Tr. v.2 at 218-219). Ms. Sanchez testified that Mr. Kiliszewski "always have an attitude" with her during prior interactions throughout her time at Challenge. (Tr. v.2 at 225). But she also stated that he had "never cuss me out before, only that day." (Tr. v.2 at 225-226). She testified that Mr. Kiliszewski made her "feel scared" during their encounter on May 5, 2017 because of his attitude. (Tr. v.2 at 225).

> Q: Have you ever been cussed out like that before at Challenge?
>
> A: No.
>
> Q: How did that make you feel?
>
> A: Really bad, like really bad because I was just trying to do my job.

(Tr. v.2 at 226) (emphasis added).

The email Ms. Sanchez wrote to Challenge was the first complaint she ever raised to Challenge's management concerning any other employee during her four years working with the company. (Tr. v.2 at 217; 400). As she testified at the hearing, she wrote the email because of the way Mr. Kiliszewski "talk[ed] to me that day." (Tr. v.2 at 219). She denied that anybody told her to draft the email, and that anybody else had written the email for her. (*Id.*) She also stated that she made the decision to draft the email because "I didn't want it to happen again. That's why I decided to write this statement." (Tr. v.2 at 219-220) (emphasis added).

H. Challenge Receives Norma Sanchez's Harassment Complaint

What Mr. O'Brien read in Ms. Sanchez's email immediately "concerned" him (Tr.v.2 at 388):

> Q: What concerned you about [the email]?
>
> A: The nature of what was written. It's not a – it's not a good – I mean this is not how normal people interact with each other. This is not how my plant, that's how I look at it, this is not how – the type of interaction I can allow to go on. It doesn't send the right message. It's not the way the community – I want our community

> looking at us... Plus, I just didn't want a female employee – I didn't want her to have concern walking back into that plant to be able to do her job...

(Tr. v.2 at 389) (emphasis added). Accordingly, Mr. O'Brien called Darlene Compeau, Challenge's HR Manager at the Holland plant, who was also a recipient of the email. (*Id.*).

Mr. O'Brien "started assessing what we needed to do immediately," with particular emphasis on determining "would these two employees be coming into contact again with each other before we could get some level of investigation or intervention." (Tr. v.2 at 389). Mr. O'Brien analyzed each employee's schedule, and determined when the pair would meet again – "everything was about protecting" Ms. Sanchez, because "that was the biggest concern." (Tr. v.2 at 390). Mr. O'Brien then instructed Ms. Compeau to open an investigation. (*Id.*).

I. Ms. Compeau Begins Her Investigation

Ms. Compeau testified that, upon reading Ms. Sanchez's email after Mr. O'Brien contacted her, she was "shocked" at the email's contents because of "the aggression that was used and the refusal to do the work – the whole context of it." (Tr. v.2 at 285). On the following Monday morning, Ms. Compeau arrived at work and found a document on her desk. (Tr. v.2 at 286). This document, written and signed by Challenge Production Operator David Napier, was extremely straightforward:

> 10:25 pm 5-5-17
>
> I David Napier heard maintenance man (Mike) tell Norma Fuck You Bitch while in a screaming match.

(R Ex 14)[10]. Ms. Sanchez testified at the hearing that this was the witness statement she referenced in her email to Mr. O'Brien and Ms. Compeau. (Tr. v.2 at 232). Mr. Napier provided Ms. Sanchez the statement on the night of the incident with Mr. Kiliszewski, and Ms. Sanchez in turn left a copy of the document on Ms. Compeau's desk over the weekend. (Tr. v.2 at 232-233). Although Ms. Compeau also intended to interview Mr. Kiliszewski that Monday, Mr. Kiliszewski called in and was absent from his shift beginning on Sunday night and ending Monday morning. (Tr. v.2 at 286; also see R Ex 9 at 2).

J. Challenge Interviews Mr. Kiliszewski

On Tuesday, May 9, 2017, Jeff Glover, Challenge's Maintenance Manager for the Holland facility, asked Mr. Kiliszewski to come with him to a conference room, where Mr. Glover and Ms. Compeau sat down to interview Mr. Kiliszewski about the alleged conflict with Ms. Sanchez. (Tr. v.2 at 288; 361).

Ms. Compeau and Mr. Glover each testified at the hearing about what happened during this meeting, and each of their stories was consistent. Mr. Glover recalled that Ms. Compeau introduced herself to Mr. Kiliszewski. (Tr. v.2 at 361). Shortly after the three sat down, Mr. Kiliszewski pulled out a tape recorder and placed it on the table. (Tr. v.1 at 41; v.2 at 289; 361). Ms. Compeau told Mr. Kiliszewski that he was not authorized to tape record the conversation under Challenge's policies. (Tr. v.2 at 289). Mr. Kiliszewski protested, claiming that he had a federal right to tape record the proceedings, which Ms. Compeau refuted. (*Id.*). At

[10] The copy of (R Ex 14) introduced into evidence at trial contains an additional notation at the bottom of the page – Mr. Napier's signature followed by a date of 5/11/17. During the hearing, Ms. Sanchez was initially confused by this notation, claiming at first that she received the document on this date. (Tr. v.2 at 233). This, of course, contradicted her earlier testimony and implicitly contradicted her email, in which she claimed to have received Mr. Napier's prior to writing her emailed complaint, which was sent on May 6, 2017. (Tr. v.2 at 232-234). Ms. Sanchez realized her mistake during the hearing, and clarified that the date at the top of the document was the date when the statement was written. (Tr. v.2 at 234). Further, Ms. Compeau testified that the signature and date were not present when she first received the document, and that she engaged second shift superintendent Tom Phipps to follow up with Mr. Napier on May 11 in order to verify the document's authenticity, and she asked Mr. Phipps to gather Mr. Napier's signature and date to prove the authenticity. (Tr. v.2 at 286-287).

this point, both Ms. Compeau and Mr. Glover agree that Mr. Kiliszewski became aggressive with Ms. Compeau. (Tr. v.2 at 289-290; 361). In Ms. Compeau's words:

> [H]e was being very aggressive and made me so uncomfortable. And I am not – how do I say this, I'm not a meek individual. And I have been doing this for a very long time. And I have in my 25-plus years, I've never had somebody treat me that way when I was just trying to get to the bottom of something. I'm trying to help them. And he was not having any of it.

(Tr. v.2 at 290). Ms. Compeau explained that Mr. Kiliszewski expressed his displeasure towards her at this time by "[r]aising his voice, refusing not to record, [and] demeaning me... He wouldn't even look at me. He, I mean, turned his back to me so – he turned his back to me." (*Id.*). This was consistent with Mr. Kiliszewski's demeanor towards Ms. Compeau during the entirety of her interview with him. In Ms. Compeau's words:

> When I would ask him questions, tell me what occurred on Friday night, he wouldn't look at me. He wouldn't address me. He treated me very similar to the way that he treated – to the way he treated Norma [Sanchez] based on the information that I had in – I really didn't have any other information other than this.

(Tr. v.2 at 289). Ms. Compeau left the interview room to find Mr. O'Brien. (*Id.*). Mr. O'Brien testified that Ms. Compeau told him at this time that "things are escalating quickly, and I need you to get involved." (Tr. v.2 at 391). Mr. O'Brien walked back with Ms. Compeau to the conference room. (*Id.*). He reiterated to Mr. Kiliszewski that he was not authorized to tape the meeting. (Tr. v.2 at 392). Mr. Kiliszewski relented and removed the batteries from the recorder. (*Id.*). Mr. Kiliszewski asked for a union witness, and requested Mr. Mathews to attend the meeting. (Tr. v.2 at 42). Mr. Mathews had already left for the day, so Mr. O'Brien offered to suspend the meeting until the following day. (Tr. v.2 at 399). Mr. Kiliszewski declined, telling the Challenge team "okay, well, let's get this over and done with, so I ... proceeded with their investigation." (Tr. v.1 at 42).

At this time, Mr. Kiliszewski produced a piece of paper and set it on the table. (Tr. v.2 at 291). The paper was a copy of the email Ms. Sanchez had sent to multiple recipients on May 6 (R Ex 8), except that Mr. Kiliszewski had handwritten numbered, line-by-line rebuttals to various allegations made by Ms. Sanchez[11] in her email. (GC Ex 3; Tr. v.2 at 291; 362; 392-393). Mr. O'Brien explained that when Mr. Kiliszewski first produced this document, his eyes immediately noticed Larry Boyer's name at the top of the page. (Tr. v.2 at 393). Although Mr. Kiliszewski had not been a recipient of Ms. Sanchez's email, Mr. Boyer (who was Mr. Kiliszewski's direct supervisor) had been. This fact "concerned" Mr. O'Brien "immediately" because "how did this statement from this email that was not addressed to Mike [Kiliszewski], how did it get into his hands. And why is Larry [Boyer's] name at the top of it?" (Tr. v.2 at 394). Mr. O'Brien asked Mr. Kiliszewski "at least twice, two times if not three times" how he had obtained the email, but Mr. Kiliszewski refused to answer each time. (Tr. v.2 at 397). Mr. Kiliszewski admitted for the first time during the hearing that Mr. Boyer had in fact provided the email to him the night of the incident. (Tr. v.1 at 44).

After producing his rebuttal document, Mr. Kiliszewski "went through the document." (Tr. v.2 at 291). Based solely on his own written rebuttal as presented to Challenge during this meeting, the following facts were explicitly admitted to by Mr. Kiliszewski:

- Ms. Sanchez approached Mr. Kiliszewski on more than one occasion to receive maintenance help on welding machine 079. (GC Ex 3 at #4).
- A conflict between Ms. Sanchez and Mr. Kiliszewski began in the presence of Mr. Mathews at 10:23 PM when Ms. Sanchez asked him to fix the machine. This was not the first time Ms. Sanchez told Mr. Kilizewski to fix machine 079. (GC Ex 3 at #4).

[11] Mr. Kiliszewski admitted during the hearing that this was how he intended his rebuttal statement to be read. (Tr. v.1 at 71). His handwritten portion was intended to refute Ms. Sanchez's individual allegations, with his own specific statements intentionally refuting specific statements raised by Ms. Sanchez in her own email.

- Mr. Kiliszewski alleged that Ms. Sanchez began "pushing the limits and leading into a hostile work environment" when she said to him at 10:23 PM "Mike I need you to go fix 79." (GC Ex 3 at #5).
- Mr. Kiliszewski admitted to telling Ms. Sanchez "where's your fucking second shift maintenance guy?" (GC Ex 3 at #5) (emphasis added).
- After Ms. Sanchez allegedly told Mr. Kiliszewski that other second shift maintenance employees were fixing other machines, Ms. Sanchez allegedly "didn't ask she demanded and her exact words [were] 'You'll do what I say, when I say.'" (GC Ex 3 at #7). In response, Mr. Kiliszewski told Ms. Sanchez: "We don't take orders from you, only requests." (GC Ex 3 at #8) (emphasis added).
- Mr. Kiliszewski then told Ms. Sanchez "to get the hell away from me."[12] (GC Ex 3 at #9) (emphasis added).
- Mr. Kiliszewski responded to Ms. Sanchez's allegation that she had told him to fix machine 079 by writing that Ms. Sanchez's "demand" was "clearly unprofessional and disrespect[ful]on Norma [Sanchez's] behalf. Another example of inexperience." (GC Ex at #9).
- Ms. Sanchez wrote in her email that "Mike tries to intimidate me when I ask him for help." Mr. Kiliszewski's response to this allegation was: "Respect isn't given, it's earned." (GC Ex at #13) (emphasis added). He also claimed in his statement that "I don't intimidate anyone, if any super requests my assistance I do as they need." (GC

[12] Although this is what is in Mr. Kiliszewski's written statement, during his direct examination Mr. Kiliszewski claimed that he told Mr. Glover, Mr. O'Brien, and Ms. Compeau on May 9 during his investigatory interview that he actually said to "get the hell out of my face" on the night in question. (Tr. v.1 at 42). This statement is closer to Ms. Sanchez's recollection, which was that Mr. Kiliszewski told her to get the "fuck out of his face." (R Ex 8).

Ex at #12). In order to receive his help, Mr. Kiliszewski claimed "[a]ll any super has to do is use a little respect." (GC Ex at #15).

Ms. Compeau testified that Mr. Kiliszewski "provided no additional detail regarding the incident from Friday night" other than reiterating what was on the page. (*Id.*). Mr. Glover concurred, stating that Mr. Kiliszewski "basically ran down that document verbatim, outlining everything that was written on there." (Tr. v.2 at 362). Mr. O'Brien also agreed that Mr. Kiliszewski did little more than "walk[] us through, that being Darlene [Compeau], myself, and Jeff Glover, each one of these bullet points along the way." (Tr. v.2 at 394). In fact, as Mr. O'Brien reiterated:

> Q: Did [Mr. Kiliszewski] add additional items that aren't here? Did he talk beyond what is on this paper?
>
> A: No, this was it. So what we see here, I don't recall anything else being added in than what was noted in this particular email. And that's what he spent the time going through as its noted here.

(Tr. v.2 at 394).

Mr. Kiliszewski, when recalled to provide rebuttal testimony by the General Counsel during the hearing, claimed that "[w]e talked about more than just what I provided" on his rebuttal email (GC Ex 3) during the May 9 investigation meeting. (Tr. v.1 at 446). Specifically, Mr. Kiliszewski claimed that he told Ms. Compeau, Mr. Glover and Mr. O'Brien that Ms. Sanchez had "lunged" at him during the incident, that Ms. Sanchez was "yelling and screaming" at him during their encounter, and that Ms. Sanchez was "creating a hostile environment" on the night of May 5. (*Id.*). Mr. Kiliszewski also claimed during his testimony that when he first arrived at the facility on the night of May 5, he had been provided a directive by Production Supervisor Joe Maynard to fix a different machine than Ms. Sanchez asked him to fix before Ms. Sanchez ever approached him. (Tr. v.1 at 34).

But Mr. Kiliszewski's testimony on this point was shifting and inconsistent. During his direct examination on the first day of the hearing, Mr. Kiliszewski alleged, for example, that Ms. Sanchez lunged at him (Tr. v.1 at 38), even though this allegation does not appear in his written rebuttal (GC Ex 3), in the written statement he submitted to the Michigan Unemployment Insurance Agency[13] (R Ex 11), nor did he include this detail in his affidavit submitted to the NLRB as part of its investigation (Tr. v.2 at 453):

> Q: So you did – you – in GC – 3, you told me you wrote contemporaneous with this event, right, same time, you had someone that now you're saying was screaming, yelling, and lunging at you.
>
> A: Yes.
>
> Q: But in defense of yourself you thought it wise not to include that description in the events [in GC Ex 3], correct? You decided not to.
>
> A: No.

(Tr. v.2 at 449). But he did not testify during his direct examination that he told Challenge during the May 9, 2017 investigatory interview that Ms. Sanchez lunged, screamed at him, or created a hostile environment. Further, during cross-examination, Mr. Kiliszewski admitted that his written rebuttal (GC Ex 3) "is the response that [he] gave to the Employer in support of what [he] did." (Tr. v.1 at 84).

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[13] Mr. Kiliszewski's statement to the UIA provides perhaps the clearest evidence that he was simply not a credible witness. In his UIA statement (R Ex 11 at pg 7), Mr. Kiliszewski submitted (under penalty of perjury) a numbered, handwritten rebuttal of a similar format to the one he presented to Challenge (GC Ex 3). But the two statements are different in several material ways. For example, in the UIA statement, Mr. Kiliszewski claimed that he "asked [Ms. Sanchez to get the second shift maintenance team," whereas in the statement to Challenge he admitted that he actually said "where is your fucking second shift maintenance guy" in response to Ms. Sanchez's allegation that he used such language. (Tr. v.1 at 113; GC Ex 3; R Ex 11 at 7). Likewise, in his UIA statement, Mr. Kiliszewski said that "I told her to leave me alone. She just won't reason. I told her again I'm not on the clock yet." But in his statement to Challenge in response to the same line of Ms. Sanchez's email, he admitted that he "[t]old her to get the hell away from me and not to bother us." (*Id.*). The implication is clear – Mr. Kiliszewski intentionally softened his description of his own conduct on the night of May 5 when presenting testimony to the unemployment agency in order to collect benefits. The disparate descriptions of the events also implies that Mr. Kiliszewski understood that some of the admissions he made to Challenge reflected poorly on him.

Further, each of Challenge's witnesses who were present during Challenge's meeting with Mr. Kiliszewski on May 9, 2017 specifically denied at the hearing that Mr. Kiliszewski raised any of the issues he discussed during rebuttal during his investigatory interview:

> Q: Yesterday, during Mr. Kiliszewski's testimony, he claimed that he explained beyond this document and explained how Ms. Sanchez had lunged at him during the altercation referenced in [GC Ex 3]. Do you recall him ever describing her lunging at him or anything like that?
>
> ....
>
> Ms. Compeau: No.
>
> ...
>
> Q: [I]sn't it true that in [Mr. Kiliszewski's] description of the events, he informed you that Ms. Sanchez yelled and screamed at him?
>
> Ms. Compeau: No.
>
> Q: He didn't say that?
>
> Ms. Compeau: No, not that I – no, not that I recall. He did not.

(Tr. v.2 291-292; 332).

> Q: Mr. Kiliszewski also said yesterday during his testimony that before the incident noted in Respondent's Exhibit 8, sameday, sometime between 10:00 pm and the incident in [R Ex 8], he said that he received a directive from Joe Maynard. Do you recall him bringing that up during your meeting with him?
>
> Mr. Glover: No.

(Tr. v.2 at 363).

> Q: He also testified yesterday that he said he talked to you guys about having received a directive from Joe Maynard between the 10:00 and 10:20 time period... and he said therefore that's why he couldn't help Norma [Sanchez]... Do you recall him telling you about that?

> Mr. O'Brien: That was never brought up. And if it had been brought up, I would have questioned that immediately because Joe Maynard works in a completely different area than Norma does in our plant.
>
> ...
>
> Q: Do you recall Mike [Kiliszewski] describing Norma [Sanchez] as lunging at him?
>
> Mr. O'Brien: I don't recall him saying that... I don't recall him telling me that.

(Tr. v.2 at 395-396). Notably, Mr. O'Brien also testified that Mr. Kiliszewski never raised the allegation that he believed he was being targeted for his union activity, or his support for the UAW. (Tr. v.2 at 399).

Mr. Glover, Mr. O'Brien, and Ms. Compeau all drafted contemporaneous incident reports following the May 9 investigation meeting – none of which mention that Mr. Kiliszewski raised issues beyond those identified in his rebuttal statement. (See R Ex 25; R Ex 26; R Ex 13). Indeed, this is consistent with Mr. Kiliszewski's testimony on cross-examination, when he stated that his rebuttal statement constituted "the response that [he] gave the Employer in support of what [he] did." (Tr. v.1 at 84).

K. The Challenge Investigation Team Weighs in on Mr. Kiliszewski's Statement

After the conclusion of the meeting, all three members of the Challenge team were taken aback. Mr. Glover testified that after the meeting was over, "[m]y impression at that point given what we had learned to that point was that Mike [Kiliszewski] had gotten a little aggressive and used some language with the supervisor, Norma [Sanchez], that wasn't appropriate." (Tr. v.2 at 365). Mr. Glover explained that although Mr. Kiliszewski denied during the meeting that he ever called Ms. Sanchez a "bitch" during their confrontation, Mr. Glover personally believed he had. "Simply put, Mike [Kiliszewski] is known to be a bit of a hot

head. It wouldn't surprise me." (Tr. v.2 at 365). Mr. Glover also explained that he was influenced by the fact that he didn't "think [Mr. Kiliszewski] took responsibility or accountability. I don't think he denied what he had done. But as far as taking any responsibility that it was wrong, no." (Tr. v.2 at 365-366). Mr. Glover, on the other hand, felt that Mr. Kiliszewski's conduct was wrong even assuming the confrontation occurred as Mr. Kiliszewski claimed it had in his statement:

> Q: Do you think it was wrong?
>
> A: Yes.
>
> Q: Why?
>
> A: Because there's a clear expectation that we treat each other with dignity and respect regardless of position. It doesn't matter if it's me or the janitor. First of all, we should not be addressing anybody in that fashion.

(Tr. v.2 at 366). Mr. Glover also testified that he did not feel Mr. Kiliszewski's actions were justified based on his excuse that Ms. Sanchez was not his direct supervisor:

> Supervision in the building runs the building. It doesn't matter. We don't have departmental lines that say this supervisor or that supervisor. If you receive direction from a leadership person in the building, my expectation would be is that we follow it.

(*Id.*).

Mr. O'Brien left the meeting feeling that Mr. Kiliszewski believed his actions, even as admitted, were acceptable. (Tr. v.2 at 398). He testified that Mr. Kiliszewski took "no accountability" for engaging in unacceptable conduct at any time during the meeting. (Tr. v.2 at 397). "[H]e didn't deny the fact that there was an altercation or an interaction with Norma [Sanchez]. He didn't deny the fact that there was words that were used and that the situation became heated. But [Mr. Kiliszewski] described his actions as] definitely not a big deal... And that just again just doesn't fit a manufacturing setting today." (Tr. v.2 at 398).

At the time when the meeting concluded, Ms. Compeau's impression based on the information learned up to that point in the investigation was that she "believe[d] that Norma [Sanchez] asked for help. And the back and forth here, she asked for help and he said tell your – where is your... fucking second shift maintenance guys?" (Tr. v.2 at 296). Further, Ms. Compeau also noted that Mr. Kiliszewski "didn't take any ownership of any of this. He didn't take – there was nothing in any of the conversation, nothing that showed that he, that he owned any of this, that he had any accountability for the, for the interaction between him and Norma [Sanchez]." (Tr. v.2 at 295). Ms. Compeau explained that "based on that conversation, based on the way I was treated, based on the information I had [in GC Ex 3]... I was now searching for a reason to keep Mike [Kiliszewski] employed." (*Id.*) (emphasis added).

L. The Investigation Continues

Ms. Compeau continued the investigation over the following days. On May 11, 2017, she directed Supervisor Tom Phipps to collect a witness statement from Mr. Napier, and to verify the authenticity and accuracy of his handwritten witness statement that he provided to Ms. Sanchez on May 5. Mr. Phipps did just that. (R Ex 14; 15). On May 11, Ms. Compeau also interviewed and collected signed witness statements from second shift Maintenance Technician Eugene Miles (R Ex 19), and folklift operator Ian Pershing (R Ex 23). The following day, she interviewed and collected more witness statements from welder operator Gerald DeChaney (R Ex 21), welder operator Lilianna Guarjardo (R Ex 27), and welder operator Stacey Karsten (R Ex 29). Each of these statements were specifically taken from persons Mr. Kiliszewski named in his rebuttal document[14] (GC Ex 3 at #6 and 14). Ms. Compeau also interviewed Eric Mathews on

[14] Mr. Kiliszewski also alleged that the confrontation with Ms. Sanchez occurred in front of another Challenge employee named "Miss Willy." (GC Ex 3 at #14). The reference to "Miss Willy" refers to Willie May Walton, a Challenge employee who was terminated on May 7, 2017. (Tr. v.1 at 182). Ms. Walton was not interviewed by Challenge as part of Ms. Compeau's investigation because by the time Ms. Compeau began investigating the

May 12, who Mr. Kiliszewski alleged in his written rebuttal had been present during the entire heated portion of his altercation with Ms. Sanchez. (GC Ex 3 at #4; R Ex 17).

Each of these statements described the confrontation between Mr. Kiliszewski and Ms. Sanchez differently. Mr. DeChaney's statement, for example, claimed that Ms. Sanchez swore at Mr. Kiliszewski during the confrontation, but claimed that Mr. Kiliszewski never swore himself. (R Ex 21). This, of course, contradicted Mr. Kiliszewski's own admissions in his rebuttal document, where he admitted he'd asked Ms. Sanchez where her "fucking" second shift maintenance employees were, and admitted he'd told Ms. Sanchez to get "the hell out of here." (GC Ex 3). Ian Pershing, as another example, claimed that both Ms. Sanchez and Mr. Kiliszewski swore during the event. (R Ex 23). Mr. Pershing also told Ms. Compeau that he had heard Mr. Kiliszewski call Ms. Sanchez a "bitch," but that he hadn't made this comment during the confrontation itself. (*Id.*). This contradicts both Ms. Sanchez and Mr. Napier's statements. (R Ex 8; 14; 15). Ms. Compeau testified on cross-examination that she believed most of these witnesses when they provided their statements. (Tr. v.2 at 337-339).

M. Challenge Decides to Terminate Mr. Kiliszewski's Employment

After Ms. Compeau concluded her investigation, she brought a recommendation forward to Mr. Glover, Mr. O'Brien, and Holland's Plant Manager Drew Ferris. (Tr. v.2 at 305). That recommendation was to "terminate Mike's employment." (*Id.*). Ms. Compeau made this recommendation "because of the nature of the altercation," especially when considering factors such Mr. Kiliszewski's (admittedly) vulgar language directed at another person, his failure to follow Ms. Sanchez's work instruction, the potential impact of his failure to fix a machine

incident, Ms. Walton had already been terminated. (Tr. v.2 at 313). Although the General Counsel called Ms. Walton to testify during the hearing, her testimony is entirely irrelevant because she never presented any of her personal knowledge of the event to Challenge, and her witness statement was not available at the time Ms. Compeau was investigating the incident in question. (Tr. v.2 at 312). Accordingly, Ms. Walton's testimony is irrelevant as a matter of law because Challenge could not have relied on anything she knew about the event when it decided to terminate Mr. Kiliszewski.

manufacturing a critical component, Mr. Kiliszewski's lack of remorse, and the fact that he directed his tirade against a female employee. (Tr. v.2 at 305-306).

The ultimate decision regarding Mr. Kiliszewski's job status fell to Mr. O'Brien. (Tr. v.2 at 400). In making his decision, Mr. O'Brien testified:

> I looked at the facts, looked at the statements that had been presented. I looked at the interaction Mr. Kiliszewski and I had that morning [of May 9]. I looked at past history. But ultimately, it came down to this is not how we can treat another employee inside of our manufacturing plant when a basic request is made to fix a piece of equipment and the response is what was noted here. But ultimately what it came down to is Norma [Sanchez] was believable. I worked with Norma. There was never a case where Norma presented anything to me that wasn't believable. Norma wasn't considered a high maintenance employee that griped a lot or did anything else. I mean she did her job every day and she was quiet, but she got her job done. And when she [] included me on the statement I knew it was serious enough, that's first off.
>
> But what I looked into with Darlene [Compeau's] help as well, and looking at other items than I guess just these few things here, I mean it was a case of it was just we couldn't continue to tolerate that type of behavior happening on our premises moving forward.

(Tr. v.2 at 401). Mr. O'Brien testified that at the time he made his decision to terminate Mr. Kiliszewski, he concluded that it was more likely than not that Mr. Kiliszewski swore at Ms. Sanchez, and that it was also more likely than not that Mr. Kiliszewski said "fuck you bitch" as Ms. Sanchez walked away based on Ms. Sanchez's initial email and Mr. Napier's contemporaneous statement. (Tr. v.2 at 401-402). But profanity was only "a piece of the puzzle," and "the bigger piece of it is really the interaction and that's the disrespect, that is dignity, that is the harassment that's there... That's not how we can respond to each other in today's work environment." (Tr. v.2 at 404). Finally, Mr. O'Brien also found it was significant that Mr. Kiliszewski did not follow the direction of a supervisor to fix broken equipment. (Tr. v.2 at 404). Notably, however, at the time Mr. O'Brien terminated Mr. Kiliszewski, he was not

personally aware that Mr. Kiliszewski had ever supported the UAW, or that he engaged in union activity. (Tr. v.2 at 399). O'Brien stated that "I did not know Mike was a supporter of it." (Tr. v.2 at 402).

Mr. O'Brien, Mr. Glover, Mr. Ferris, and Ms. Compeau were present at Mr. Kiliszewski's employment termination meeting. (Tr. v.2 at 309). Ms. Compeau explained that Challenge would be letting him go. (*Id.*). In response, Mr. Kiliszewski "was very, very calm" and shook the men's hands. (*Id.*). But he "once again didn't make eye contact" with Ms. Compeau, nor did he "speak to [her], or really address [her]. And he left the room." (*Id.*).

N. Mr. Kiliszewski Files an Unfair Labor Practice Charge

Mr. Kiliszewski filed an unfair labor practice charge against Challenge on May 23, 2017. (GC Ex 1(a)). His Charge originally contained five allegations: that Mr. Kiliszewski was discharged in violation of Section 8(a)(3) because "the employee joined or supported a labor organization and in order to discourage union activities or membership;" that Challenge violated section 8(a)(1) when it "interrogated" Mr. Leadingham about his union activities; that Challenge maintained work rules prohibiting employees from discussing terms and conditions of employment and from forming, joining, or supporting labor unions in violation of 8(a)(1); and that Challenge violated Section 8(a)(2) of the Act by "unlawfully dominating or controlling the operations" of the UAW. (GC Ex 1(a)). Notably, the UAW did not bring or join the Charge on Mr. Kiliszewski or its own behalf. As Mr. Tomko testified during the hearing:

> Q: At any time sitting here today, has the UAW ever contacted you, talked to you, given you any communication about any concerns about Mike Kiliszewski['s discharge]?
>
> A: No.
>
> Q: Has the UAW filed any grievance that Challenge has violated the neutrality agreement by how it treated Mr. Kiliszewski?

A: No.

Q: Because of his discharge, have they filed a grievance?

A: No.

Q: Have they filed an unfair labor practice against the Company because of what happened to Mike Kiliszewski?

A: The UAW has not.

On January 23, 2018, the Regional Director withdrew Mr. Kiliszewski's 8(a)(2) domination charge. (Tr. v.1 at 8). The Regional Director issued its Complaint against Challenge on January 31, 2018. (GC Ex 1(g)). Challenge filed its First Amended Answer on May 29, 2018, in which it admitted that Mr. Leadingham was a supervisor under Section 2(11) of the Act. (GC Ex 1(g)). At the hearing, the General Counsel amended the complaint to delete the pending allegations about the allegedly overbroad work rule. (Tr. v.1 at 9-10).

ARGUMENT

Mr. Kiliszewski alleges that Challenge terminated his employment because he supported the UAW, and engaged in union activity in early 2017. But he cannot prevail on his charge for five broad reasons:

- First, the record proves that the Challenge executive who made the decision to terminate Mr. Kiliszewski's employment did not know about his union activity at the time the decision to terminate was made. The Challenge supervisor who complained about Mr. Kiliszewski's conduct on May 5, 2017 also did not know he supported the UAW.
- Second, the General Counsel attempts to meet its burden to prove union animus through testimony of a former Challenge supervisor, who alleged that another Challenge supervisor told him that Mr. Kiliszewski "was being watched." Not only is this allegation insufficient on its face to prove union animus, but Challenge introduced

testimony rebutting that the alleged comment was ever even made. Finally, the assertion that Challenge harbored union animus is absurd given the context – Challenge and the UAW are partners on an active Neutrality Agreement, and the parties have engaged in a productive course of collective bargaining under its terms such that over half of Challenge's facilities employ workers who are now represented by the UAW.

- Third, Mr. Kiliszewski was fired after a female supervisor complained that he had refused to follow her work instructions, and had directed vulgar language at her in an attempt to intimidate her into backing down. During Challenge's comprehensive and thorough investigation, Mr. Kilizewski submitted a statement which largely corroborated the supervisor's complaint. Challenge would have fired any employee under similar circumstances, regardless of his or her union support or activity. Mr. Kiliszewski's conduct is simply unacceptable in a modern workplace.
- Fourth, there is no evidence that Challenge's legitimate reason for discharging Mr. Kiliszewski was pretextual. Evidence demonstrates that Mr. Kiliszewski was not the only Challenge employee who was ever terminated for using profanity at work, or for insubordination. Also, Mr. Kiliszewski and other Challenge employees also engaged in known, similar union activity during previous organizing campaigns which Challenged opposed before it entered into the 2016 Neutrality Agreement with the UAW, but none of these employees were ever disciplined.
- Fifth, Mr. Kiliszewski's conduct towards Ms. Sanchez was so vulgar and egregious that he lost the protections of the National Labor Relations Act.

Mr. Kiliszewski's unfair labor practice charge should be dismissed in full.

A. Legal Standard

To establish discrimination in violation of Section 8(a)(1) or 8(a)(3) where the employer's motivation is at issue, the General Counsel must prove that union activity was a motivating factor in the adverse action alleged to constitute unlawful discrimination. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd 66 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982); *Taylor & Gaskin*, 277 NLRB 563 (1985).

To establish this *prima facie* case, the General Counsel must prove: (1) that an employee engaged in protected union activity; (2) that the employer had knowledge of such activity; (3) that the decision-maker harbored animus towards the union or protected activity; and (4) that a causal connection exists between the protected activity and the adverse employment action. *Dorey Elec. Co.*, 312 NLRB 150, 151 (1993). The General Counsel must prove its *prima facie* case by "direct evidence or reasonable inference. Proof of suspicious circumstances is not enough." *Dorey Elec. Co*, 312 NLRB at 151 (emphasis added).

Even if the General Counsel establishes discriminatory motive there still may be no violation of the Act. The burden merely shifts to the employer to demonstrate that it would, more likely than not, have taken the same action absent the protected conduct. *ADB Utility Contractors*, 353 NLRB 166, 166-67 (2008); *Commercial Air, Inc.*, 362 NLRB No. 39, slip op. at 52-53. Said differently, an employer is protected "from liability even in the face of a finding of anti-union animus" if there is credible proof that a layoff constituted a legitimate business decision. *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 652 (D.C. Cir. 1994) (citing *Elastic Stop Nut Div. of Harvard Indus. v NLRB*, 921 F.2d 1275, 1280 (D.C. Cir. 1990)).

Finally, if an employer puts forth evidence establishing a business justification showing that the adverse employment action would have occurred under the second prong of the Wright Line analysis, the General Counsel must present "persuasive countervailing evidence"

proving that the employer's business case is a mere pretext for discrimination. *Commercial Air, Inc.*, 362 NLRB No. 39, slip op. at 52-53; *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). An employer's reasons are pretextual if they are "false or not in fact relied upon." *United Rentals, Inc.*, 350 NLRB 951, 952 (2007).

B. The General Counsel cannot meet its burden under *Wright Line* because the Challenge manager who terminated Mr. Kiliszewski did not have knowledge of his union activities, or his support for the UAW.

"[T]he most basic element" of an § 8(a)(3) case is a showing "that the employer was... aware of the discharged employees' protected activities." *Goldtex, Inc. v. NLRB,* 14 F.3d 1008, 1011 (4th Cir. 1994). As a threshold issue, the General Counsel's case suffers from a simple but fatal flaw – there is no evidence that Keith O'Brien, the individual decision-maker who ultimately elected to terminate Mr. Kiliszewski's employment (Tr. v.2 at 400), ever knew about any of Mr. Kiliszewski's support for the UAW, or about any of his union activity in general.[15] In fact, Mr. O'Brien specifically testified that he was not aware that Mr. Kiliszewski had ever supported the UAW, or that he had ever engaged in any union activity. (Tr. v.2 at 399). O'Brien stated that "I did not know Mike was a supporter of it." (Tr. v.2 at 402).[16]

Mr. O'Brien's lack of knowledge of Mr. Kiliszewski's support for the UAW is reasonable and credible under the circumstances. Challenge's Holland facility is large, both in size and in with respect to the number of employees who work there. (Tr. v.2 at 384). By virtue of his role as Vice President of Operations, Mr. O'Brien holds responsibility to oversee "operations, how our plants run, [and] what goes on within them" within all eight of Challenge's plants nationwide. (Tr. v.2 at 383). Moreover, Mr. O'Brien is a relative newcomer to Challenge, as he has only occupied this position for just over two years as of the date of the hearing. (*Id.*).

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[15] The same is true of Ms. Sanchez, the supervisor who initially complained about Mr. Kiliszewski's conduct. See Section C.2 of the Argument below.

[16] Despite this clear answer, the General Counsel failed to ask any question of Mr. O'Brien about his knowledge.

Accordingly, Mr. O'Brien could not have had any knowledge of Challenge's labor relations practices prior to the ratification of the 2016 Neutrality Agreement, nor was Mr. O'Brien present at Challenge during the 2010, 2013, or 2015 organizational campaigns in which Mr. Kiliszewski and Mr. Mathews (among others) participated.

It is uncontested that some members of Challenge's management were aware that Mr. Kiliszewski had historically supported the UAW. But although lower-level managers' knowledge of union activity may be generally imputed to the ultimate decision-maker by inference, the Board has held that "we will not impute knowledge of union activities where the credited testimony establishes the contrary." *Dr. Phillips Megdal, Inc.,* 267 NLRB 82, 82 (1983). This is true here, where Mr. O'Brien credibly testified that he personally lacked such knowledge at any time prior to the filing of Mr. Kiliszewski's unfair labor practice charge. Moreover, the Board has also held that the most crucial inquiry with respect to the "knowledge" element of the General Counsel's prima facie case is whether or not the decision-maker had actual or constructive knowledge of the alleged discriminatee's protected activity. *See, e.g., Shamrock Foods Co.,* 366 NLRB No. 115 (2018) (holding that although General Counsel presented some evidence that one manager knew about the discharged employees' support for the union, the second *Wright Line* element could not be met because the decision-maker did not know about the union activity).

Because Mr. O'Brien denied having knowledge of Mr. Kiliszewski's union activity at the time he made his decision to terminate him, and because no evidence has been presented to refute that testimony, the General Counsel cannot sustain this essential element of her prima facie case. The 8(a)(3) claim must be dismissed.

C. The General Counsel cannot meet its burden under *Wright Line* because it has failed to present sufficient evidence that Challenge's termination of Mr. Kiliszewski's employment was motivated by union animus.

To establish this *prima facie* case, the General Counsel must prove that the decision-maker harbored animus towards the union or protected activity. *Dorey Elec. Co.*, 312 NLRB 150, 151 (1993). As the Board has held, "[t]he existence of union animus or discriminatory motivation is normally determined from consideration of the employer's attitude regarding (a) the union, (b) the organizing campaign, if there was one in progress during any relevant time, (c) employees who support the union or engage in organizational or other protected activities, and (d) other related subjects, as reflected by statements and conduct including infringements upon employees' statutory rights." *J. Ray Mcdermott & Co.*, 233 NLRB 946, 951 (1977).

1. The Board should adopt a *per se* rebuttable presumption that an employer did not act with union animus where, as here, the allegedly discriminatory act occurred while the employer and the union are parties to a neutrality agreement and the Union has not alleged a breach of that agreement.

Challenge and the UAW have been parties to a nationwide neutrality agreement since May 1, 2016. (R Ex 5). The stated purpose of this Agreement is "to enhance an efficient organizing process and maintain stable labor relations."[17] (R Ex 5) (emphasis added). In fact, both Challenge and the Union regarded the 2016 Neutrality Agreement to be of such mutual beneficial value that the parties extended the agreement through an Amendment, which was executed on September 15, 2017. (R Ex 6). As Mr. O'Brien explained, the 2016 Neutrality Agreement and its accompanying amendment created a "partnership" between Challenge and the

[17] This is consistent with the broad purpose neutrality agreements in the world of labor relations generally. Neutrality agreements create a series of mutually beneficial "concessions" between employer and union, which are intended to "serve the interests of both [employer] and the union, as they eliminate the potential for hostile organizing campaigns in the workplace." *Adcock v. Freightliner LLC,* 550 F.3d 369, 375 (4th Cir. 2008). "In this sense," the Fourth Circuit Court of Appeals has held, "the concessions certainly are not inimical to the collective bargaining process." *Id.*

UAW, which "involves a mutual agreement on how our plants are to operate." (Tr. v.2 at 399). Mr. O'Brien also stated that the cooperative relationship between the UAW and Challenge "is based on our core beliefs and principles that we have as a company." (*Id.*).

Consistent with that purpose, under the Neutrality Agreement, Challenge and the UAW have negotiated four plant-wide collective bargaining agreements (including one covering a facility where recognition was extended through an election which occurred prior to the Agreement's finalization) and to extend voluntary recognition to the UAW as the exclusive bargaining representative in four separate Challenge facilities across the country. (Tr. v.2 at 255-257). As of the date of the hearing, Challenge and the UAW were also engaged in bargaining at Plant 3 in Walker, Michigan under the Agreement's terms. (Tr. v.2 at 256-257). In short, Challenge has permitted more than half of its nationwide manufacturing facilities to become unionized by the UAW without protest or opposition. And more organizing activity is on the horizon: the Neutrality Agreement's Amendment contains a stipulated schedule between Challenge and the UAW defining the order in which the UAW will attempt to organize each of Challenge's three remaining non-unionized facilities.[18] (Tr. v.2 at 256; R Ex 6).

Said simply, Challenge has demonstrated the antithesis of animus towards the union both by entering into and adhering to the terms of the 2016 Neutrality Agreement with the UAW.[19] This is fatal to Mr. Kiliszewski's Section 8(a)(3) claim in this case. As the United States Supreme Court has explained:

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[18] The UAW has agreed only to conduct an organizing campaign in Challenge's Holland plant after the parties have ratified collective bargaining agreements in Plant 3 and Plant 1. (R Ex 6).

[19] Accordingly, although no court or Board panel has created such a rule to date, Challenge argues that the Board should recognize a rebuttable presumption against a finding of union animus where, as here, the following three factors exist:

- The employer and the union have entered into an active neutrality agreement and have taken steps to comply with its terms in good faith;
- The charging party's union activity which allegedly motivated the employer to retaliate was in support of the same union covered by the neutrality agreement with the employer; and

> The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership is proscribed.

Radio Officers v. NLRB, 347 U.S. 17, 42-43 (1954) (emphasis added). Thus, to prevail on Mr. Kiliszewski's Section 8(a)(3) charge, the General Counsel must prove that the termination of Mr. Kiliszewski's employment was to discourage membership in the UAW. But in order to establish the requisite union animus in this case, the General Counsel must overcome the following facts, each of which is unrebutted in the record:

- Challenge voluntarily entered into the Neutrality Agreement with the UAW in May of 2016 (R Ex 5);
- Challenge has adhered to all obligations imposed by the 2016 Neutrality Agreement's terms;
- Four plants have been organized under the 2016 Neutrality Agreement;
- Four collective bargaining agreements have been successfully negotiated since Challenge and the UAW executed the 2016 Neutrality Agreement;
- The UAW agreed to extend the terms of the Neutrality Agreement by executing an Amendment in September of 2017; and
- The UAW has never alleged that Challenge has violated the Agreement.

To hold that union animus existed in the light of such evidence would require the Board to conclude that Challenge fired Mr. Kiliszewski because he supported the UAW and to

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- The union which is a party to the neutrality agreement is not a party to the pending § 8(a)(3) charge, and has not itself ever alleged any breach of the underlying agreement.

discourage membership in the UAW, despite the fact that Challenge had no objection to the introduction of thousands of its employees into UAW-represented bargaining units across the country. These positions are inherently inconsistent, cannot be harmonized, and is persuasive evidence that the General Counsel cannot sustain its burden to prove union animus in this case.

2. The General Counsel's only evidence of union animus comes in the form of statements allegedly made by Challenge's management to Challenge supervisor Carl Leadingham, but no Challenge supervisor ever made those statements, and the alleged statements also cannot prove union animus in this context.

The General Counsel must prove the existence of union animus in order to avoid dismissal of Mr. Kiliszewski's Section 8(a)(3) charge. But the presented evidence of animus in this case is too weak to withstand the General Counsel's burden. Indeed, the only shred of evidence the General Counsel offers to prove union animus is a comment allegedly made by Maintenance Supervisor Craig Ritter to Mr. Leadingham concerning Mr. Kiliszewski.

At the hearing, Mr. Kiliszewski testified that Carl Leadingham called him on a day in April of 2017, shortly after Mr. Leadingham was suspended by Challenge because Challenge suspected that Mr. Leadingham – a supervisor[20] – may have violated the Neutrality Agreement. (Tr. v.1 at 28; v.2 at 267). Mr. Kiliszewski described the conversation[21] as follows:

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[20] The General Counsel, through her questions during direct examination of Mr. Leadingham, implied that Mr. Leadingham's classification as a supervisor was something less than bona fide. (Tr. v.1 at 134 ("Q: Now, it's true prior to April 2017, you didn't know that you were a supervisor; is that correct? A: That's correct.")). Although documents introduced into the record prove that Mr. Leadingham received notice of this status change – and a corresponding increase in pay – at the time of his changed status (R Ex 33), the General Counsel is procedurally barred from arguing otherwise because it included Mr. Leadingham's supervisory status as one of its allegations in its Complaint, and Challenge admitted to that allegation. (GC Ex 1(f); Tr. v.1 at 9 ("[W]e are amending paragraph 4 of the complaint to allege Carl Leadingham has a 2(11) supervisor, which Respondent has already admitted.")).

[21] Mr. Kiliszewski's testimonial allegation that Challenge was "watching" him and that he should "watch his back" is based upon a statement Mr. Leadingham allegedly made to him during a telephone conversation on April 25, 2017 concerning a statement Mr. Compeau, Mr. Tomko, or Mr. Glover allegedly told Mr. Leadingham. This presents a textbook example of double hearsay, and counsel for Challenge timely raised this objection. (Tr. v.1 at 29-31). Under the Federal Rules of Evidence, hearsay evidence – defined as "a statement, other than one made by the declarant while testifying, offered in evidence to prove the truth of the matter asserted" (FRE 801(c)) – is generally inadmissible. Mr. Kiliszewski's statement meets this standard because he testified regarding a statement made to him by an out-of-court declarant (Mr. Leadingham), the subject of which was another statement made to Mr.

Q: [W]hat was your conversation with Mr. Leadingham?

A: He told me he was questioned on his involvement with engaging in union activity.

Q: And what else did he say?

...

A: So then [Ms. Compeau] explained to him how they had a good source that told him when he stops by my area, that we're engaging in union conversation.

...[22]

Q: Okay. And did he say anything as far as – well, and what else was said, if anything?

A: He said that they suspended him pending their investigation.

Q: Was there anything else that was said?

A: He told me whatever I do, to watch my back because everybody is watching us and anyone else involved in union activity.

(Tr. v.1 at 32-33) (emphasis added).

The General Counsel's entire prima facie case rests upon whether or not this specific testimony can establish a finding of union animus on Challenge's part, because no other evidence of union animus was presented.[23] It cannot, for at least the following reasons:

Leadingham by another, unidentified out-of-court declarant (a Challenge manager). It also was surely presented for the truth of the matter asserted by the underlying Challenge manager – that is, whether or not Mr. Kiliszewski in fact was being watched by Challenge and whether or not he should "watch his back" as a result. Accordingly, the objection should be sustained, and Mr. Kiliszewski's testimony about what Mr. Leadingham allegedly told Mr. Kiliszewski that he had been told by Challenge's management should be stricken in its entirety.

[22] Mr. Kiliszewski also alleged that Ms. Compeau told Mr. Leadingham that Challenge's policy prohibited employees from "engag[ing] in any type of union talk with other employees or to discuss union activities whatsoever." (Tr. v.1 at 33). Although this allegation is (1) hearsay and (2) untrue, it more fundamentally relates to a withdrawn portion of the charge no longer in dispute in this case. (Tr. v.1 at 9).

[23] Union animus also cannot be proven based on the fact that Challenge suspended Carl Leadingham and asked him about his involvement with the UAW for four reasons. First, Challenge could not have independently violated Mr. Leadingham's rights because supervisors are categorically excluded from the Act's definition of "employee." See Section 2(11) of the Act, codified at 29 U.S.C. § 152. Second, the Board has clearly held that an employer does not interfere with any non-supervisory employee's rights in violation of Section 8(a)(1) merely by interrogating or disciplining a supervisor "as a result of their participation in union or concerted activity – either by themselves or

- First, the statement is not true. Mr. Leadingham's testimony was clear. No Challenge manager ever told Mr. Leadingham that Mr. Kiliszewski had a target on his back and Mr. Leadingham never told Mr. Kiliszewski that.
- Second, the record is devoid of any evidence that the decision-maker, Mr. O'Brien, had any connection with or knowledge of the false allegation that someone in management allegedly put a target on Mr. Kiliszewski's back.
- Third, even if Mr. Leadingham's testimony is credible, all his testimony establishes is that individuals in management were watching Mr. Kiliszewski. And under the facts in this case, such surveillance was reasonable and did not constitute union animus because Challenge was legitimately concerned that the UAW may be breaching the terms of the parties' Neutrality Agreement by engaging in union activity in the Holland plant while negotiations were ongoing in Pontiac.
- Fourth, even if Mr. Leadingham's testimony is credible, the ALJ must weigh the allegation that Challenge was "watch[ing]" Mr. Kiliszewski's union activity against the overwhelming context of cooperation and support between Challenge and the UAW.

a. *No Challenge supervisor ever told Mr. Leadingham that Mr. Kiliszewski should "watch [his] back."*

Mr. Kiliszewski testified that Mr. Leadingham called him on April 25, 2017, immediately after Mr. Leadingham was suspended pending investigation during a meeting with

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allied with rank-and-file employees." See *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982). *See also Miller Elec. Co.*, 301 NLRB 294 (1991); *Metro Transport LLC*, 351 NLRB 657, 661 (2007) (holding that employer did not violate Section 8(a)(1) of the Act by threatening to terminate supervisor for attending a union meeting or by interrogating him about employees' union activity). Third, the evidence proves that Challenge's concern about Mr. Leadingham's union support or involvement was not motivated by union animus – it was instead motivated by Challenge's fear that Mr. Leadingham's unauthorized conduct would put Challenge in the position of violating the 2016 Neutrality Agreement. (Tr. v.2 at 267) (Mr. Tomko: "Obviously, because of the neutrality agreement, we were very concerned that Carl Leadingham was allegedly participating in UAW meetings."). Fourth, Mr. Leadingham never actually suffered any adverse employment action at any time throughout this process, as Challenge returned him to work and provided him backpay because it believed Mr. Leadingham's (false) denial that he had anything to do with the UAW. (Tr. v.1 at 146; v.2 at 267-268; R Ex 34).

Mr. Tomko, Ms. Compeau, and Mr. Glover. (Tr. v.1 at 28). Mr. Kiliszewski claimed that during this conversation, Mr. Leadingham conveyed to him a message one of those three managers told Mr. Leadingham during that meeting: Challenge was watching Mr. Kiliszewski because of his union activity, and Mr. Kiliszewski needed to "watch [his] back." (Tr. v.1 at 33).

But Mr. Leadingham, who testified at the hearing, directly and materially refuted Mr. Kiliszewski's recollection of this telephone conversation in two key ways.[24] First, Mr. Leadingham did not testify that Mr. Tomko, Ms. Compeau, or Mr. Glover told him that Mr. Kiliszewski was "being watched" by Challenge – instead, he said that Maintenance Supervisor Craig Ritter told this to him. (Tr. v.1 at 136-137). Second, Mr. Leadingham clarified through his hearing testimony that the warning for Mr. Kiliszewski to "watch his back" represented Mr. Leadingham's own personal opinion about what Mr. Kiliszewski should do, and was not a threat made by any Challenge supervisor that he was passing along to Mr. Kiliszewski:

> Q: You indicate that Mr. Ritter told you that Mike should watch his back. Did I get that correct?
>
> A: No, he told me not to talk to him because he –
>
> Q: Okay. Mr. Ritter told you to not –
>
> A: To avoid him.
>
> Q: To avoid Mike [Kiliszewski]?
>
> A: Yes. That he was being watched.
>
> Q: Mr. Ritter told you to avoid Mike because Mike was being watched.
>
> A: Correct.

[24] This represents another reason to sustain Challenge's objection to Mr. Kiliszewski's double hearsay testimony as argued in fn. 15: under the Board's application of the hearsay rules, uncorroborated hearsay is viewed skeptically when admitted, and is frequently excluded entirely. *Delphi/Delco E. Local 651*, 331 NLRB 479, 481 (2000); *Ohmite Mfg. Co.*, 290 NLRB 1036, 1037 (1988). This is refuted hearsay. Mr. Kiliszewski's testimony about what Mr. Leadingham told him should be excluded.

Q: That's what you remember him telling you.

A: Yes.

Q: Anything else that he told you about Mike that's relevant?

A: No.

(Tr. v.1 at 145-146). Accordingly, Mr. Kiliszewski's recollections of what Mr. Leadingham said should be afforded no credibility because Mr. Leadingham was available, testified, and refuted Mr. Kiliszewski's recollections directly. The more credible testimony between Mr. Kiliszewski and Mr. Leadingham is that Mr. Ritter told Mr. Leadingham that Challenge's management was watching Mr. Kiliszewski's union activity, and that neither Mr. Ritter nor any other Challenge manager ever threatened Mr. Kiliszewski to Mr. Leadingham.

But Mr. Leadingham's own testimony was itself refuted by another witness – Mr. Ritter himself. Mr. Ritter testified plainly and clearly that he never told Mr. Leadingham that Mr. Kiliszewski was being watched:

> Q: Carl testified that you told him in the spring of 2017, April-May timeframe, you told him that essentially management was aware that Mike Kiliszewski was a union supporter, lead union organizer, and the Company kind of put a target on Mike and that Carl should stay away from Mike. Is that true?
>
> A: No. I never said that to Carl.
>
> Q: Did you say anything like that? Did you tell [] Carl that the Company was out to get Mike for any reason?
>
> A: No.
>
> . . .
>
> Q: Do you have any idea why Carl would come in and testify that you would suggest that the Company had something against Mike, out to get Mike?
>
> A: No, I don't. I don't really understand Carl at all. I don't know what his thought frame would be.

(Tr. v.2 at 248). Mr. Ritter stuck to his story during cross-examination as well:

> Q: And did Mr. Leadingham have a conversation with you at all about being questioned about union activity by the Employer?
>
> A: Carl and I didn't talk much, so no.
>
> Q: You didn't talk, okay.
>
> A: We didn't talk much.
>
> Q: So you don't recall such a conversation?
>
> A: Not at all.

(Tr. V.2 at 251).

The General Counsel can point to no evidence or any reason why Mr. Ritter's testimony should be not credited. Mr. Ritter had no involvement in the incident that resulted in the termination of Mr. Kiliszewski's employment, nor is there any evidence Mr. Ritter had a vendetta against Mr. Kiliszewski. Further, the best evidence of what Mr. Ritter told Mr. Leadingham (which Mr. Leadingham later passed along to Mr. Kiliszewski in a literal game of "telephone") is provided by Mr. Ritter himself.

Further, Mr. Leadingham's own credibility is also suspect, as exhibited in multiple instances during the hearing. First, as part of the investigation into whether or not Mr. Leadingham was involved with the Union, Mr. Tomko testified that he "questioned [Carl] about his involvement, and he denied any involvement." (Tr. v.2 at 267). Mr. Leadingham prepared a witness statement as part of this investigation, in which he stated that he had been "falsely" accused of involvement with the UAW. (R. Ex 34). During the hearing, however, he admitted that he did in fact talk to other employees about the UAW in derogation of Challenge's supervisor training (Tr. v.1 at 135). Second, Mr. Leadingham incredibly claimed during the hearing that he did not know he was a supervisor, even though his supervisory status was not an

issue in dispute in this case. (Tr. v.1 at 143). When presented with documentation proving that his supervisory status was conveyed to him in November of 2016 on a document containing his acknowledgement signature (R Ex 33), Mr. Leadingham claimed that he'd "never seen this document before." (Tr. v.1 at 144).

Mr. Leadingham also has a plausible motive to be less than truthful with respect to his testimony, which was presented in opposition to Challenge. First, Mr. Leadingham explained that he telephoned Mr. Kiliszewski immediately after he was informed about his suspension – he could at the time have understandably been angry or upset with Challenge as a result. (Tr. v.1 at 137). Second, Mr. Leadingham's testimony also shows that he felt slighted by Challenge because he received only five days of backpay instead of seven after he was reinstated and made whole. (Tr. v.1 at 146).

But even if both Mr. Leadingham and Mr. Ritter are held to be equally credible, this is the sort of "he-said-she-said situation" in which "Board law holds that [the ALJ] must find the General Counsel did not carry its burden of proof." *Eym King of Missouri,* 366 NLRB No. 5 (2018), *citing Iron Mountain Forge Corp.,* 278 NLRB 255, 263 (1986).

b. *The union animus must be attributed to the decision-maker in order to establish a prima facie case.*

Even if Mr. Leadingham's testimony is credited, that evidence proves only that Mr. Ritter believed that Mr. Kiliszewski "was being watched" by Challenge. There is no evidence that such comments could be attributed in any way to the decision-maker, Mr. O'Brien. In fact, Mr. O'Brien testified that he was unaware of any Challenge manager ever expressing that Mr. Kiliszewski "had a target on his back" because of his union support, and further explained that such animus would be nonsensical in light of the neutrality agreement. (Tr. v.2 at 399-400).

This is fatal to the General Counsel's burden to prove union animus because the alleged animus must somehow be related to the decision at issue – in this case, whether or not Mr. Kiliszewski was fired by Challenge in part because Challenge held such animus. As argued above, Mr. Ritter's impression of Challenge's activities towards Mr. Kiliszewski cannot be imputed to Mr. O'Brien as an automatic operation of law.[25] Further, in this case, the following facts unrebutted facts undercut the implication that Mr. O'Brien himself possessed union animus:

- During Mr. O'Brien's tenure as the Vice President of Operations, Challenge has gone from an organization with no unionized facilities to an organization where the UAW has represented bargaining units in the majority of its facilities;
- During Mr. O'Brien's tenure, Challenge has been a partner with the UAW pursuant to a neutrality agreement, Challenge has adhered to the terms of that agreement in good faith, and Challenge has negotiated four collective bargaining agreements with the UAW.
- During Mr. O'Brien's tenure, Challenge has not run any anti-union campaigns.

Additionally, the General Counsel cannot argue that Ms. Sanchez was somehow infected with animus for the UAW, thus leading her scrutinize Mr. Kiliszewski carefully or to fabricate the details about the event on May 5. Ms. Sanchez testified that she drafted her emailed complaint personally, and denied that any Challenge supervisor (or anyone else) instructed her to write her complaint about Mr. Kiliszewski. (Tr. v.2 at 219-220). Further, Ms. Sanchez also denied that she was ever directed to "watch" Mr. Kiliszewski, nor did she even know about his involvement in or support for the Union:

> Q: Yesterday, there was testimony that Challenge Manufacturing management level had targeted Mr. Kiliszewski because of his

[25] See Section B of Challenge's Argument section, *supra*. *See also Dr. Phillips Megdal, Inc.*, 267 NLRB 82, 82 (1983); *Shamrock Foods Co.*, 366 NLRB No. 115 (2018).

union activities. Did anybody direct you to watch Mr. Kiliszewski closely or to find a reason to fire him or anything like that?

A: No.

Q: Did you target [] Mr. Kiliszewski because he supported the Union?

A: No. I didn't know that he was supporting the Union. I didn't know that.

(Tr v.2 at 236).

All of the evidence above leads to one conclusion: Mr. Leadingham's statement cannot provide evidence of union animus in this case because the causal link between the alleged animus and Mr. Kiliszewski's discharge is missing. The alleged animus illustrated by Mr. Leadingham's testimony cannot be connected to either (i) Ms. Sanchez's decision to complain about the event on May 5 or (ii) Mr. O'Brien's decision to terminate Mr. Kiliszewski. Accordingly, the General Counsel cannot hang its case on Mr. Leadingham's testimony alone. Yet that is all the evidence it has presented. Mr. Kiliszewsi's Section 8(a)(3) claim is materially deficient, and must be dismissed as a result.

c. *Even if credited, Carl Leadingham's testimony is facially insufficent to establish union animus.*

Even if credited over Mr. Ritter's refutation, Mr. Leadingham's testimony alleges only that Mr. Ritter informed Mr. Leadingham that Challenge was watching Mr. Kiliszewski - Mr. Leadingham denied that Mr. Ritter (or any other Challenge supervisor) ever threatened Mr. Kiliszewski directly. Although an employer can demonstrate animus by creating the impression that an employee is under management surveillance, *Joe's Plastics,* 287 NLRB 210, 211 (1987) (emphasis added), the record contains testimony proving that even if Challenge was watching Mr. Kiliszewski's union activity as Mr. Leadingham alleged he was told, such observations were recorded and reported to Challenge's management only for the legitimate purpose of determining

whether or not the UAW was violating the active 2016 Neutrality Agreement by conducting organizing activity in the Holland plant before a collective bargaining agreement was ratified in Pontiac. (Tr. v.2 at 272-273). In other words, observed union activity was noted not because of any intent to suppress or inform Challenge about employees' union activities,[26] but instead to ensure the UAW's compliance with the neutrality agreement.

One additional fact proves that Challenge did not monitor organizing activity in Holland during March and April of 2017 because of any bias against the UAW or unionization in general: at the same time Challenge's supervisors were reporting observed organizing activity to Challenge's HR team, Challenge's HR team was monitoring whether or not Challenge's own supervisors were acting in compliance with the Neutrality Agreement as well. First, the record proves that Challenge took steps to educate and train all supervisors about "the responsibilities that the leadership team ha[d]" under the Agreement in light of the National Labor Relations Act. (Tr. v.2 at 260). Second, the record also proves that Challenge actually took steps to investigate when supervisors were alleged to have breached the agreement – after all, Challenge's fears that Mr. Leadingham may have engaged in conduct that violated it directly led to Mr. Tomko's decision to suspend him pending investigation. (Tr. v.2 at 267; 272) (Mr. Tomko: "Obviously, because of the neutrality agreement, we were very concerned that Carl Leadingham was allegedly participating in UAW meetings."). Challenge's efforts to ensure compliance with the 2016 Neutrality Agreement cannot prove union animus because those efforts were not directed only towards the UAW, but were also directed internally.

[26] Mr. Tomko admitted during the hearing under cross-examination that employees retained their Section 7 rights: "Q: And so it's your understanding that under the neutrality agreement as you negotiated it, that employees can still engage in union activity? A: I've never thought about it, but it's my understanding that that's their right under the law." (Tr. v.2 at 278).

The Board has never held that an employer engages in unlawful surveillance when it monitors organizing activity as part of a larger, comprehensive effort to ensure compliance with a pending neutrality agreement.[27] Accordingly, Mr. Leadingham's assertion cannot itself prove animus even if it is credited. And because this is the only shred of animus evidence in the record, Mr. Kiliszewski's Section 8(a)(3) charge must be dismissed under the circumstances.

d. *The General Counsel failed to establish union animus, especially in the context of the Neutrality Agreement.*

As argued above, Challenge asserts that Mr. Leadingham's allegation – even if credited – was insufficient on its face to evince Challenge's union animus sufficiently for Mr. Kilizewski to prevail on his Section 8(a)(3) charge. But the existence of union animus is a determination that can only be properly evaluated "when viewed in context." *See, e.g., NLRB v. Gateway Theatre Corp.,* 818 F.2d 971, 977-78 (D.C. Cir. 1987). And the substantial context available in the record further undercuts any inference that Challenge maintained union animus at all. Specifically, the following facts – each analyzed above – are critical and dispositive to the determination as to whether animus existed at Challenge:

- The UAW and Challenge were parties to a neutrality agreement;
- Challenge complied with the terms of the neutrality agreement;
- The UAW organized four facilities under the terms of the neutrality agreement;
- The UAW and Challenge have bargained four collective bargaining agreements since entering in to the neutrality agreement;

[27] The fact that the UAW is not a party to this unfair labor practice charge speaks volumes. To the extent Challenge violated this agreement, the UAW could conceivably have joined this charge, or filed a charge of its own. And it did not. (Tr. v.2 at 265).

- The UAW is not a party to this charge, nor has it ever been a party to any claim or allegation that Challenge has either violated the neutrality agreement or Mr. Kiliszewski's rights under the NLRA;
- Mr. Kiliszewski's original unfair labor practice charge contained an 8(a)(2) union domination charge, which is incompatible with the 8(a)(3) claim at issue;[28]
- The decision-maker, Mr. O'Brien, had no knowledge of Mr. Kiliszewski's support for the UAW; and
- No evidence exists which would impugn Mr. O'Brien of having knowledge of any of the surveillance statements supposedly made by Mr. Ritter to Mr. Leadingham.

The General Counsel's case for union animus - when Mr. Ritter allegedly told Mr. Leadingham that Challenge was "watching" Mr. Kiliszewski – is already weak. When that evidence is balanced against this substantial contextual evidence of an effective working relationship between the UAW and Challenge, the inference that Challenge held union animus and was motivated by when it discharged Mr. Kiliszewski is substantially undermined, if not destroyed entirely. The 8(a)(3) charge must be dismissed.

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[28] Mr. Kiliszewski's original unfair labor practice charge against Challenge contained a claim under Section 8(a)(2) in which he alleged that "[w]ithin the previous six months, [Challenge] unlawfully dominated or controlled the operations of a labor organization." (GC Ex 1(a)). This claim is no longer part of Mr. Kiliszewski's case – it was withdrawn by the Board's Regional Director on January 23, 2018. (Tr. v.1 at 7). Nevertheless, the fact that he elected to ever raise it at all undermines one of the crucial allegations his case must rest upon today – whether or not Challenge harbored animus for the UAW or for union activities in general. This is because the Board's clearly established employer domination case law holds that without evidence that an employer provided unlawful support or possessed improper "motivation" in the formation or maintenance of a labor union, Section 8(a)(2) of the Act has not been violated. *Wells Enterprises,* 367 NLRB No. 7 (2016). The contrapositive must also be true – if Section 8(a)(2) of the Act was violated by means of Challenge's relationship with the UAW as Mr. Kiliszewski alleged, there must have been some evidence that Challenge supported or was motivated to improperly encourage the UAW's organizational activity. Mr. Kiliszewski's original legal positions contradict one another – it cannot be true that Challenge both (a) possessed animus against the UAW as alleged in the 8(a)(3) claim and (b) was motivated to support and assist it to a degree that violated the Act as alleged in the 8(a)(2) claim.

D. Even if the General Counsel had met its prima facie burden, Challenge would have discharged Mr. Kiliszewski even absent his union activity, or his support for the UAW.

Even were the General Counsel to establish a discriminatory motive (which, as argued above, is not present in this case), liability is not established. Rather, the burden shifts to the employer to demonstrate that it would, more likely than not, have taken the same action absent the protected conduct. *ADB Utility Contractors*, 353 NLRB 166, 166-67 (2008); *Commercial Air, Inc.*, 362 NLRB No. 39, slip op. at 52-53. Said differently, an employer is protected "from liability even in the face of a finding of anti-union animus" if there is credible proof that the disciplinary action at issue constituted a legitimate business decision. *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 652 (D.C. Cir. 1994) (citing *Elastic Stop Nut Div. of Harvard Indus. v NLRB*, 921 F.2d 1275, 1280 (D.C. Cir. 1990)). Where an employer's disciplinary action is based on employee misconduct (as it is in this case), "[a]n employer who holds a good-faith belief that an employee engaged in the misconduct in question has met its burden under *Wright Line*. This is true even if the employer is ultimately mistaken about whether the employee engaged in the misconduct. The good-faith belief demonstrates that the employer would have acted the same even absent the unlawful motive." *Sutter Bay East Hospitals v. NLRB,* 687 F.3d 424, 434 (D.C. Cir. 2012).

As summarized by Mr. O'Brien, he decided to terminate Mr. Kiliszewski's employment for the following broad reasons:

- Mr. Kiliszewski treated Ms. Sanchez in a demeaning, inappropriate and disrespectful manner on the night of May 5 by yelling at and swearing at her, violating Challenge's employee dignity and harassment policies in the process (Tr. v.2 at 400);

- Mr. Kiliszewski was insubordinate when he failed to follow Ms. Sanchez's reasonable work directions (Tr. v.2 at 404); and
- Mr. Kiliszewski showed no remorse, nor took any accountability for his actions. (Tr. v.2 at 397-398).

These circumstances, especially when taken together, constitute legitimate reasons for discharging an employee under well-established Board law. *See, e.g., Motor Service and Supply Co. of Buffalo,* 174 NLRB 657, 659 (1969) ("[w]hile it could be argued that obscene language is commonly used by male employees, possibly to a greater extent in the type of business involved herein than in more genteel occupations, yet an employer can insist upon observance of his own standards, provided they are not discriminatorily applied"); *General Aniline and Film Co.,* 128 NLRB 102 (1960) (same holding); *Advance Watch Co., Ltd.,* 248 NLRB 1002, 1004 (1980) (holding that insubordination constitutes a legitimate basis for discharge).

1. Challenge would have discharged Mr. Kiliszewski even if he committed only the specific instances of conduct he admitted to.

During the investigation, Mr. Kiliszewski obtained a copy of the emailed complaint that Ms. Sanchez submitted to numerous Challenge supervisors from Mr. Kiliszewski's own direct supervisor Larry Boyer. (Tr. v.1 at 44). He handwrote rebuttal responses to Ms. Sanchez's specific recollections of the interaction between the two on May 5, and provided a copy of this document to Challenge during his investigatory interview with Ms. Compeau, Mr. Glover, and Mr. O'Brien. (GC Ex 3). The chart below summarizes some of Ms. Sanchez's allegations, contrasted with Mr. Kiliszewski's response to those allegations, all of which can be found in GC Ex 3.

Ms. Sanchez's Typed Allegation	Mr. Kiliszewski's Handwritten Response	#
"I continue to have issues with Mike	"There are no issues ever, the only issue in	1

Ms. Sanchez's Typed Allegation	Mr. Kiliszewski's Handwritten Response	#
Kiliszewski."	the past was on 4042 when she ok'd bad parts, and I shut it down, Q.C. manager also agreed with me."	
"Today around 10:00pm I asked Mike to come restart w079."	"Didn't punch in until 10:17 pm, 10 minutes later still not in the boiler."	2
"After around 10 minutes, w079 was still down and I went to Mike still [in] the maintenance area talking."	"When I punched it at 10:17 I was approached w/ issues on 4W055A robot 1 tip dresser broke, which was my pass down, still not on clock."	3
"I said Mike, I need you to go fix 79."	"Norma didn't ask, she demanded as [Eric] Mathews and I told her nicely the first time we're not on the clock yet, this is now 10:23, Eugene 2nd shift maint. is talking w/ operator on 4W018, she could've sent him, he was still on the clock doing nothing."	4
"Mike screamed to me Where's your fucking 2nd shift maintenance guy?"	"Now she's pushing the limits and heading into a hostile work environment and harassment situation, and yes I said fucking 2nd shift maintenance." "Back to Eugene talking on 4W018 operator while it wasn't down & Norma [Sanchez] was 20ft from him and never approached him, if anything he should've been in 55A finishing a robotic issue diagnosis."	5 & 6
"I told him they were working in other cells… I told Mike this is why I'm asking you."	"Again Norma didn't ask she demanded and her exact words (You'll do as I say, when I say)"	7
"Mike said you're not my boss, you don't tell me what to do."	"Then I and [Eric Mathews] explained as tensions are escalating, you're not our supervisor, We don't take orders from you, only requests."[29]	8
"Then he told me to get the fuck out of his face."	"Told her to get the hell away from me and not to bother us until we were on the clock, clearly unprofessional & disrespect on Norma's behalf. Another example of inexperience."	9
"I say I'm going to tell your boss."	"She says she's going to see our boss, I said would you like me to show you the way and again explained to her we were not on the clock."	10

[29] Mr. Mathews admitted during testimony that he went to repair 079 as Ms. Sanchez had asked immediately after the confrontation between Mr. Kiliszewski and Ms. Sanchez broke up. (Tr. v.1 at 165). Mr. Mathews's recollection is corroborated by a maintenance record at the machine, which proves that it took him approximately 12 minutes to repair it before it broke down again. (R Ex 12).

Ms. Sanchez's Typed Allegation	Mr. Kiliszewski's Handwritten Response	#
"As I walked away Mike yelled Fuck you bitch."[30]	"As she walked away I never said F.U. Bitch, [Eric] Mathews was 2 ft away when the conversation took place, which then got him to go off and holler at her again (we're not on the clock)"	11
"I feel Mike tries to intimidate me when I ask him for help."	"I don't intimidate anyone. If any super requests my assistance I do as they need"	12
"I find Mike to be very disrespectful to me and I am afraid to ask for help because he give me bad attitude. I have a witness statement from an employee who also heard Mike call me names. This happens right out on the production floor and I would like for this behavior from Mike to stop."	"Respect isn't given, it's earned."	13
- No specific reference	"There were 5 employees total that were in the area. Lily, Stacey, Gerald, Ian, Miss Willy, all of which clearly stated Norma was the aggressor and was out of line."	14
- No specific reference	"All any super has to do is use a little respect. We go beyond our means to do our jobs every day, I have a damn good work record."	15

Viewing the stories of Ms. Sanchez and Mr. Kiliszewski side-by-side is instructive, in this case, because the two individual, contemporaneous accounts do not differ significantly. Crucially, Mr. Kiliszewski in his own statement admitted the following facts:

- That a confrontation occurred between him and Ms. Sanchez on May 5, 2017;
- That he yelled "where's your fucking 2nd shift maintenance guy" to Ms. Sanchez when she approached him a second time seeking assistance repairing W079;
- That he refused Ms. Sanchez's "order" to repair W079 because she was not his supervisor, informing Ms. Sanchez that he didn't "take orders from [her], only requests;"

[30] It is important to remember that Ms. Sanchez's statement is supported by the written statement of David Napier, who provided the most contemporaneous account of this event out of any witness interviewed as part of the investigation or who testified during the hearing. (R Ex 14).

- That he told Ms. Sanchez to "get the hell away from me" after refusing to follow her order; and
- That he believed his conduct was justified even if Ms. Sanchez found it "intimidat[ing]" because "respect isn't given, it's earned." (Emphasis added).

Even if the encounter between Ms. Sanchez and Mr. Kiliszewski occurred exactly as Mr. Kiliszewski portrayed it in his written statement, Challenge's position is that Mr. Kiliszewski would certainly have been discharged as a result. Mr. Kiliszewski admitted to using profanity against Ms. Sanchez. He also admitted refusing to follow her request or order to fix 079. Mr. Kiliszewski's own statement also strongly implies that he did not respect Ms. Sanchez because she had not "earned" it. Accordingly, there is no dispute in this case that Mr. Kiliszewski actually engaged in the conduct which necessitated discharge. Nearly any employer would have done the same thing, especially if it enforced lawful, reasonable employee conduct policies like those included in Challenge's employee handbook. (R Ex 4).

The Board has rejected Section 8(a)(3) charges brought against an employer in at least one highly analogous circumstance. In *Waste Management of Arizona, Inc.*, 345 NLRB 1339 (2005), the employer terminated two employees who were integrally involved in two prior union organizing campaigns with the same employer. In January and February of the year in which the second campaign occurred, the employer violated Section 8(a)(1) by interrogating one of the employees about his union activities. On February 21, the same employee collected his paycheck, but believed that his employer had paid him less than he was owed. An employer supervisor attempted to explain that the calculation was correct, but the employee "became belligerent" while in earshot of other employees, "screaming statements such as 'this is fucking bullshit;' 'you're fucking with me because we're for the union;' and 'this isn't fucking

[supervisor's name] Management.'" The employee's supervisor demanded that the employee step inside his office, but the employee refused and walked out. The employer later terminated the employee, who brought an 8(a)(3) charge alleging that he had in actuality been terminated because of his union activity. *Waste Management of Arizona, Inc.,* 345 NLRB at 1340.

The Board held that the General Counsel had met its burden to prove its prima facie case, with union animus being demonstrated by the commission of the employer's other 8(a)(1) violations against the charging party employee. But the Board also found that the employer proved it would have taken the same action even in the absence of protected conduct pursuant to *Wright Line*:

> We agree with the judge that the Respondent has shown that it would have taken the same action in the absence of protected conduct. [Charging Party] screamed profanities at [supervisor] in a crowded work area, and repeatedly refused to speak to him in private, preferring to loudly curse at him in front of other employees. His conduct was insubordinate, it disrupted the workplace, and undermined [his supervisor's] supervisory authority.

Waste Management of Arizona, at 1341.

Mr. Kiliszewski's conduct was nearly identical to the conduct exhibited by the unsuccessful charging party in *Waste Management.* Both Mr. Kiliszewski and that charging party swore at their supervisor concerning a matter which had nothing to do with union activity. Both Mr. Kiliszewski and the charging party refused to follow an instruction issued by the supervisor, thus publicly undermining the supervisor's authority. In fact, Mr. Kiliszewski's conduct is more serious than the conduct exhibited by the charging party in *Waste Management* because (i) Mr. Kiliszewski used profanity toward his supervisor in the process of refusing to follow her instructions, and (ii) nothing in *Waste Management* suggests that the charging party's

obscene tirade made his (male) supervisor feel intimidated and afraid, unlike the way Mr. Kiliszewski made Ms. Sanchez feel. (R Ex 8; Tr. v.2 at 225).

Accordingly, Challenge has carried its burden to prove that it would have discharged Mr. Kiliszewski even assuming, *arguendo,* that it considered only his written rebuttal statement. The legitimacy of Challenge's decision to terminate Mr. Kiliszewski's employment is only strengthened when considering (i) the seriousness of Ms. Sanchez's written complaint of intimidation (R Ex 8); (ii) David Napier's contemporaneous, corroborated, and unrebutted eyewitness statement concluding that Mr. Kiliszewski shouted "fuck you, bitch" at Ms. Sanchez at the conclusion of their encounter (R Ex 14); and (iii) witness statements from other eye-witnesses collected during the investigation, many of which reported that Mr. Kiliszewski did swear at Ms. Sanchez (see R Ex 17 (Eric Mathews Statement); R Ex 28 (Stacy Karsten Statement); R Ex 23 (Ian Pershing Statement)), and all of which described at least some confrontation between the two on May 5.

2. Mr. Kiliszewski's excuses do not undermine Challenge's basis for discharging him.

The issue in this case is whether or not Mr. Kiliszewski was terminated because of his union activity, not whether or not Challenge had cause to discharge Mr. Kiliszewski. As the D.C. Circuit has held:

> The Board does not have the authority to regulate all behavior in the workplace and it cannot function as a ubiquitous "personnel manager," supplanting its judgment on how to respond to unprotected, insubordinate behavior for those of an employer. It is well recognized that an employer is free to lawfully run its business as it pleases. This means that an employer may discharge an employee for a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.

Epilepsy Foundation of Northeast Ohio v. NLRB, 268 F.3d 1095, 1105 (D.C. Cir. 2001).

Accordingly, the ALJ's role in this case during the second step of the *Wright Line* analysis is to determine whether Challenge would have terminated Mr. Kiliszewski given what it knew following its investigation whether or not he had been a supporter of the UAW, not to determine whether Mr. Kiliszewski actually behaved on May 5 exactly as Ms. Sanchez alleged he did. *See, e.g., NLRB v. Brookshire Grocery Co.,* 837 F.2d 1336 (5th Cir. 1988) (holding that the crucial determination is whether "[a]t the time of discharge, all of the evidence available to the company indicated" that the employee engaged in the misconduct alleged, and "[t]hus the discharge was for a proper, though later proved erroneous, reason"). The Board has always been clear on this point – "[i]n order to meet its burden under *Wright Line,* an employer need not prove that the disciplined employee had committed the misconduct alleged. Rather, it need only show that it had a reasonable belief that the employee had committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee." *DTR Industries, Inc.,* 350 NLRB 1132, 1135 (2007) (emphasis added).

Nevertheless (and despite the fact that Mr. Kiliszewski himself admitted to directing some profanity against Ms. Sanchez and refusing her work instructions), the General Counsel attempted to present facts into the record in order to excuse his conduct and to cast doubt on the thoroughness of Challenge's investigations. This clouds the actual issue in this case, and is irrelevant. Challenge was never obliged to investigate Mr. Kiliszewski's case in any particular way. *See, e.g., Detroit Newspaper Agency v. NLRB,* 435 F.3d 302, 310 (D.C. Cir. 2006). Challenge was also entitled to evaluate and weigh the evidence it gathered during its investigation according to its best discretion, so long as that discretion was "reasonable." *Sutter Bay East Hospitals v. NLRB,* 687 F.3d 424, 434 (D.C. Cir. 2012).

But even if the validity of Mr. Kiliszewski's excuses were relevant, none of the specific excuses offered by Mr. Kiliszewski undermine Challenge's reasonable and legitimate basis for discharge. Accordingly, Challenge has met its burden under the second step of the *Wright Line* analysis. Each specific excuse is discussed individually below.

a. *Excuse # 1 – Not on the clock*

Mr. Kiliszewski was regularly scheduled to work third shift at the Holland facility, meaning that his shift typically began at 10:30 PM. (Tr. v.1 at 35). Mr. Kiliszewski's first excuse is that he was free to direct profanity towards Ms. Sanchez and to refuse to follow her work instructions because he was not yet "on the clock" when Ms. Sanchez asked him to fix machine 079. (*Id.*). In other words, Mr. Kiliszewski argued that he didn't need to obey Ms. Sanchez's work directive and was entitled to direct profanity towards her because she asked him to perform work too early.

As a threshold issue, the evidence and testimony in the record is inconsistent when it comes to establishing when, exactly, Ms. Sanchez first approached Mr. Kiliszewski seeking his assistance. Ms. Sanchez's emailed statement states that the first interaction between her and Mr. Kiliszewski occurred around 10:00 PM. (R Ex 8). Mr. Kiliszewski testified, however, that "as I walked in the door" on May 5, he immediately had a conversation with second shift production supervisor Joe Maynard, who allegedly told him that machine 055A was the "hottest cell in the shop." (Tr. v.1 at 34; 36). This all occurred, he claimed, before he ever saw Ms. Sanchez that night. (Tr. v.1 at 35). Mr. Kiliszewski's written statement also claims that he was approached w/ issues on W055A immediately after punching in, which he said occurred at 10:17 PM. (GC Ex 3, at #3). Mr. Kiliszewski's timecard, submitted into evidence by Challenge at the hearing, proves that he did in fact punch in to work on May 5 at 10:17 PM. (R

Ex 9). Further, during cross-examination, Mr. Kiliszewski admitted that Ms. Sanchez first approached him after he had punched in:

> Q: So she did, she did want you to go fix that machine. That's when she approached you.
>
> A: Yes.
>
> Q: This is after, right, this is after 10:17 PM, so you're punched in. You're not on the clock.[31] She comes up to you, and she says at 10:17, 10:18, whenever this is, and she, according to you, she didn't ask you, she demanded "I want you to get over on 79." Correct?
>
> A: Yes.[32]

(Tr. v.1 at 74-75; 76). Finally, fellow Maintenance Technician Eugene Miles provided a witness statement in which he told Challenge that he spoke with Mr. Kiliszewski to provide him with "pass down" information about what was happening on the shop floor just before Mr. Miles left the facility, thus missing the confrontation. (R Ex 19). Mr. Miles also told Challenge that he believed this pass down had occurred at about 10:20 PM, which meant that Mr. Kiliszewski and Ms. Sanchez first encountered each other at some time around 10:20. (R Ex 19). Accordingly, the most likely time when Mr. Kiliszewski and Ms. Sanchez first interacted that night was some time after 10:17 PM. Although Mr. Kiliszewski was not "on the clock" at that time, it would be thirteen minutes later, at the most, before he was.

Ms. Sanchez testified that it was during her second interaction with Mr. Kiliszewski that he swore at her. (Tr. v.2 at 218). Ms. Sanchez's emailed complaint estimates that this second encounter occurred approximately ten minutes after their first interaction. (R Ex

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[31] Mr. Kiliszewski clarified that Challenge employees use the term "on the clock" to refer to the time when they are scheduled to begin working. (Tr. v.1 at 74). Employees can therefore be "punched in" to Challenge's timekeeping system without being "on the clock" if they punch in before the beginning of their scheduled start time.

[32] Mr. Kiliszewski, perhaps realizing that his statement conflicted with his testimony on direct, briefly tried to distance himself from his written rebuttal (GC Ex 3): "Some of then handwritten statements could be inaccurate." (Tr. v.1 at 102). Moments later, however, he admitted that (GC Ex 3) was "the more accurate account of the time" at which various events occurred. (Tr. v.1 at 103).

8). Mr. Kiliszewski's written statement is roughly consistent with Ms. Sanchez's recollection – in point number 4 of his rebuttal, Mr. Kiliszewski claims that Ms. Sanchez asked him to fix machine 079 a second time at 10:23 PM. (GC Ex 3, at # 4). This timing also harmonizes with other evidence in the record. In both her emailed complaint and her testimony, Ms. Sanchez recalled that Mr. Kiliszewski was standing and talking to another maintenance man when the second encounter occurred. (R Ex 8; Tr. v.2 at 224). Mr. Kiliszewski acknowledges he was standing near another person, and identifies this maintenance employee as Mr. Mathews. (Tr. v.1 at 37; GC Ex 3, at # 4). Mr. Mathews admitted he was with Mr. Kiliszewski when he swore at Ms. Sanchez during this second encounter, and Mr. Mathews recalled that this event occurred "a little bit" before the third shift was scheduled to start. (Tr. v.1 at 158). This is also consistent with the written statement Mr. Mathews submitted as part of Challenge's investigation, which states that the conflict between Mr. Kiliszewski and Ms. Sanchez occurred when Mr. Mathews had "just walked in the door" on May 5. (R Ex 17). Mr. Mathews timecard shows he punched in at 10:22 PM that night. (R Ex 18). Thus, it is likely that Mr. Kiliszewski yelled "where's your fucking second shift supervisor" at Ms. Sanchez at approximately 10:23 PM – less than seven minutes before second shift was scheduled to end and Mr. Kilizewski was scheduled to be on the clock. This timeline is also consistent with David Napier's written witness statement, which claims that he heard Mr. Kiliszewski shout "fuck you bitch" at Ms. Sanchez at 10:25 PM. (R Ex 14). Laid bare, Mr. Kiliszewski's paraphrased argument is as follows in light of this evidence: *Because I wasn't supposed to start working until 10:30 PM, I was justified when at 10:23 PM I refused to fix a machine as instructed by Ms. Sanchez, when I yelled "where's your fucking second shift maintenance guy" at her, and when told her to "get the hell away from me."* Mr. Kiliszewski's argument is that seven minutes of time should excuse such conduct. This

excuse does not carry water, and the fact that he raised it in his statement does not delegitimize Challenge's decision to terminate his employment.

This is especially true because testimony at the hearing proves that even Mr. Kiliszewski's preferred timeline could not have saved his job. As Maintenance Manager Jeff Glover testified during the hearing, maintenance technicians like Mr. Kiliszewski are "expect[ed] to respond" by "[g]o[ing] and try[ing] to help out with the machine" in response to a maintenance request "if they're on the production floor," regardless of whether or not that employee's scheduled shift had not yet started. (Tr. v.2 at 358).

> Q: But if they're not scheduled to be paid until 10:30, can they still just refuse the work order because they're not – their shift didn't start?
>
> A: No, they shouldn't be on the production floor if that's what the case is.

(Tr. v.2 at 359). Accordingly, the timing of Ms. Sanchez's request excuses neither Mr. Kiliszewski's refusal to perform the work nor the aggressive, profane nature of the means by which he refused her.

b. *Excuse # 2 – Norma lacked authority to direct him*

The record proves that Mr. Kiliszewski was a maintenance technician, and Ms. Sanchez was a production supervisor working in Area 1 of the Holland plant on May 5, 2017. (Tr. v.1 at 36). Ms. Sanchez typically worked second shift, while Mr. Kiliszewski was scheduled to work third shift. At the hearing, Mr. Kiliszewski testified that Ms. Sanchez was not his supervisor - "not whatsoever." (*Id.*).

Mr. Kiliszewski's testimony is technically correct. As a third shift maintenance technician, Mr. Kiliszewski reported to Larry Boyer, who was Mr. Kiliszewski's direct supervisor. (Tr. v.1 at 39). And Mr. Kiliszewski relied on this technical distinction in his written

rebuttal statement, wherein he claimed that he was entitled to refuse Ms. Sanchez's demand to fix machine 079 because Ms. Sanchez "was not our supervisor. We don't take orders from [her], only requests." (GC Ex 3 at # 8).

But the distinction cannot excuse Mr. Kiliszewski's refusal to follow Ms. Sanchez's order because evidence in the record proves that maintenance supervisors receive their minute-to-minute work instructions from Production Supervisors like Ms. Sanchez on a routine and regular basis. During the hearing, Mr. O'Brien testified that Production Supervisors and maintenance mechanics worked "very, very close[ly] with each other" on the production floor. (Tr. v.2 at 385). He explained that Production Supervisors "rely upon maintenance to help fix items that are broken," "and the Production Supervisor when a problem occurs will end up contacting that technician in that area that they are responsible for to fix it." (Tr. v.2 at 385-386).

> Q: How would they contact them?
>
> A: Our maintenance staff along with our leadership staff, the production supervisor group, they wear radios so that's a primary mechanism for contacting each other... We have visual management as well. So the maintenance technicians wear a vest that's black so very visible to see where they're at and our supervisors wear a red vest so we know who is who. So if radio contact can't be made, you'll go walk and try to find somebody...
>
> Q: What's your expectation if a production supervisor asks for help getting a machine up and running?
>
> A: Immediate response.

(Tr. v.2 at 386). Mr. Glover's testimony reinforced this point:

> Q: And so the direction for maintenance mechanics comes directly from the production supervisor?
>
> A: Yes.
>
> Q: That's how it occurs on a daily basis?
>
> A: Yes.

> Q: And what do you expect your maintenance mechanics to do when they receive a direction from a production supervisor?
>
> A: Well, my expectation is that they respond as quickly as they can to get the machine back up and running.
>
> Q: You expect that they then – if someone asks them to do it, to actually do what they're being asked?
>
> A: Yes.

(Tr. v.2 at 358). Further, Mr. Kiliszewski himself admitted that production supervisors like Ms. Sanchez "contact maintenance and say we need help" on a "daily" basis, such that requests like the one Ms. Sanchez made to him on May 5, 2017 were "nothing out of the ordinary." (Tr. v.1 at 85-86). Mr. Mathews further agreed during cross-examination that production "[s]upervisors coming up and asking you guys for some help on a machine, it happens on a daily basis." (Tr. v.1 at 173). Accordingly, Mr. Kiliszewski was obligated to follow Ms. Sanchez's directive to fix machine 079 – whether or not she phrased it as an "order" or a "request." Challenge acted reasonably when it discharged him for refusing to follow it.

c. *Excuse # 3 – Norma's behavior was also inappropriate*

One additional means by which Mr. Kiliszewski tried to defend his disrespectful and profane conduct towards Ms. Sanchez is to claim that Ms. Sanchez also disrespected him. Mr. Kiliszewski explained at the hearing that Ms. Sanchez began getting "a little hostile" with him almost immediately after he told her he could not fix machine 079 until he was on the clock. (Tr. v.1 at 35). He later claimed that she returned "screaming" and "hollering" at him, which made his "blood" begin "boiling." (Tr. v.1 at 37-38). Mr. Kiliszewski's hearing testimony is inconsistent with his written rebuttal statement submitted to Challenge as part of its investigation. In his written statement, Mr. Kiliszewski accuses Ms. Sanchez of not "asking" but "demanding" assistance, and further accuses her of "pushing the limits and heading into a hostile

work environment and harassment situation" after she told him "Mike, I need you to go fix 79." (GC Ex 3, at # 5). At no time does Mr. Kiliszewski's written statement mention that Ms. Sanchez was screaming or hollering.

Mr. Kiliszewski's hearing testimony also differs drastically from any of his prior explanations of this event in one significant respect – at the hearing, Mr. Kiliszewski claimed that Ms. Sanchez "lunged" at him during the final confrontation between the two. (Tr. v.1 at 38). Mr. Kiliszewski did not include this detail in his written rebuttal (GC Ex 3), nor did he mention that Ms. Sanchez ever moved towards him aggressively in the written affidavit he submitted to the Board as part of the Board's investigation process. (Tr. v.2 at 453). Only one of the witnesses to the event, Willie Mae Walton, ever recalled that Ms. Sanchez "lunged" at Mr. Kiliszewski during their dispute, and Ms. Walton's testimony is irrelevant because she never provided a statement to Challenge, nor could she have been interviewed because she was terminated before Ms. Compeau started her investigation. (Tr. v.2 at 313).

These distinctions make Mr. Kiliszewski's testimony about Ms. Sanchez's allegedly equally egregious conduct incredible. In addition, Challenge relied on Mr. O'Brien's own personal experience with Ms. Sanchez as opposed to Mr. Kiliszewski when deciding who to believe about Mr. Kiliszewski's allegations that Ms. Sanchez crossed the line herself:

> Ultimately, what it came down to is Norma was believable. I worked with Norma. There was never a case where Norma had presented anything to me that wasn't believable.

(Tr. v.2 at 400). This was in contrast with Mr. Kiliszewski's well-known reputation as a "hot head," which was also reflected on at least one of Mr. Kiliszewski's former performance reviews. (Tr. v. 2 at 410; R Ex 42). There is nothing illegitimate about Mr. O'Brien's good-faith decision to believe Ms. Sanchez's statement over statements submitted by other employees. *See, e.g., DTR Industries, Inc.,* 350 NLRB 1132, 1135 (2007).

d. *Excuse # 4 – Joe Maynard's conflicting instruction*

During the hearing, Mr. Kiliszewski introduced a new, fourth excuse in an attempt to explain why he was entitled to insubordinately refuse to follow Ms. Sanchez's work instructions. Mr. Kiliszewski claims that when he first arrived on the production floor on May 5, second shift production supervisor Joe Maynard "informed me that one of the cells [55A] was the hottest cell in the shop. And he said it was down, and if I could check it out, to go do so." (Tr. v.1 at 34). Mr. Kiliszewski alleged that he agreed, and told Mr. Maynard he would fix machine 55A as soon as he "got on the clock." (*Id.*). Mr. Kiliszewski explained that he next was approached by Ms. Sanchez, and that he refused to fix machine 079 when she requested to do so. (Tr. v.1 at 35-36). Mr. Kilizewski then alleged that he "quick walked over to the rockers" – that is, to machine 055A – "to see what was going on." (Tr. v.1 at 36). Evidently, based on his testimony, he inspected 55A despite the fact that he was not on the clock at that point. But he claims he again refused Ms. Sanchez's request to fix 079 when she returned to ask him to do so again. (Tr. v.1 at 37-38). Mr. Kiliszewski explains this situation in less detail in his written rebuttal statement. (GC Ex 3, at # 3).

During direct examination, Mr. Kiliszewski explained that Mr. Maynard's instruction somehow trumped Ms. Sanchez's instruction:

> Q: There was some discussion in your cross-examination of a chain of command. When you first arrived, on direct you indicated that a supervisor approached you. Who was that?
>
> A: Joe Maynard.
>
> Q: And Joe Maynard, where is he in the chain of command? Is he above Sanchez or below Sanchez?
>
> A: Yes, he's above.
>
> Q: Okay. So he told you machine 55[A] was hot?

A: Yes.

Q: And needed to be repaired, okay. And is it normal for you to follow the directions of superior supervisors over lower supervisors?

A: Yes.

(Tr. v.1 at 127-128).

But several Challenge employees testified that this was not true. Mr. Glover explained that Mr. Maynard belonged to the same position as Ms. Sanchez – they were both production supervisors on second shift. (Tr. v.2 at 364). Moreover, Mr. Glover explained that it would be unusual for Mr. Maynard to provide Mr. Kiliszewski with repair instructions because Mr. Maynard was assigned to Area 5, whereas both Mr. Kiliszewski and Ms. Sanchez worked in Area 1. (*Id.*). Mr. O'Brien corroborated Mr. Glover's testimony, and added that Mr. Kiliszewski had never raised this particular excuse during the team's investigation interview with him. (Tr. v.2 at 395). Mr. O'Brien specifically stated that "if it had been brought up, I would have questioned that immediately because Joe Maynard works in an entirely different area than Norma [Sanchez] does in our plant." (*Id.*). Further, even if Mr. Maynard had provided Mr. Kiliszewski with a conflicting directive before he was approached by Ms. Sanchez, no witness testified that Mr. Kiliszewski ever tried explaining this to Ms. Sanchez when she approached him to ask for help.

3. Modern employers such as Challenge can no longer tolerate employees who direct abusive and profane language against female and minority supervisors.

In the early hours of Saturday, May 5, 2017, Ms. Sanchez endured an experience that left her shaken: a maintenance employee swore at her, refused to work as instructed, told her to "get the fuck out of his face," and yelled "fuck you, bitch" at her as she walked away. (Tr. v.2 217-218; 221-223). As she later described the event:

> Q: [Y]ou feel like Mike tries to intimidate you when [you] asked [for] help. What did you mean by that?
>
> A: Like he just – I feel scared. When I was asking help to him, I was just –
>
> Q: What made you feel scared?
>
> A: Because he have an attitude. He gave me an attitude like I don't know, if I ask for help, I don't know if he's going to help. Like he always have an attitude. But he never cuss me out before, only that day.
>
> Q: Have you ever been cussed out like that before at Challenge?
>
> A: No.
>
> Q: How did that make you feel?
>
> A: Really bad, like really bad because I was just trying to do my job.

(Tr. v.2 at 225-226) (emphasis added).

She had two choices – speak up, or stay silent.[33] She did not stay silent. So she sat down and drafted an email to various members of Challenge's senior-level management team. (R Ex 8). In her email, she relayed the details about a disturbing conflict she had with Mr. Kiliszewsi mere hours prior. As she testified at the hearing, she wrote the email because of the way Mr. Kiliszewski "talk[ed] to me that day." (Tr. v.2 at 219). "I didn't want it to happen again. That's why I decided to write this statement." (Tr. v.2 at 220) (emphasis added).

[33] What is unfortunate is the Region's decision to move forward on this matter adding to the societal pressures that make women reluctant to report harassment. According to the EEOC's Select Task Force on the Study of Harassment in the Workplace Report from June of 2016, approximately 70% of employees who experience harassing conduct in the workplace do not report it. Among those reasons for not filing harassment complaints, the EEOC's report concluded that "[e]mployees who experience harassment fail or report the behavior or file a complaint because they anticipate and fear a number of reactions – disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation; and professional retaliation, such as damage to their career and reputation." *Id.*, at pg. 16. Available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

Hours later, Challenge's Vice President of Operations Keith O'Brien and the Holland facility's HR Manager Darlene Compeau received the email. It contained the following language:

- "I continue to have issues with Mike Kiliszewski."
- "I have addressed my concerns with [his supervisor] Larry Boyer and not much has changed."
- "Mike screamed to me 'Where's your fucking 2nd shift maintenance guy?'"
- "Then he told me to get the fuck out [of] his face."
- "As I walked away Mike yelled 'Fuck you bitch.'"
- "I feel Mike tries to intimidate me when I ask him for help."
- "I find Mike to be very disrespectful to me…"
- "I am afraid to ask for help…"
- "I would like for this behavior from Mike to stop."

(R Ex 8).

What, in 2018, is a modern, reasonable, and proactive employer supposed to do in the light of receiving an email like the one excerpted above? Federal employment law provides that when an employer is placed on notice of harassing conduct based on sex or any other protected characteristic, "the employer is obligated to take prompt and appropriate action reasonably calculated to put a halt to this conduct." *Ward v. City of Streetboro,* 89 F.3d 837, at *3 (6th Cir. 1996). This is also consistent with Challenge's own employee handbook, which provides that "[e]ach report" of discrimination or harassment "will be given serious consideration and investigated thoroughly, promptly, and as confidentially as possible. Prompt and remedial action will be taken to eliminate harassment from the work place." (R Ex 4 at 3-4).

Challenge rose to every appropriate, ethical, and legal standard. Challenge was obligated to take Ms. Sanchez's complaint seriously, and it did so. Mr. O'Brien testified that he had never received an email like this from Ms. Sanchez before. (Tr. v.2 at 388). Ms. Compeau testified that she "was shocked that something of this nature occurred." (Tr. v.2 at 285).

Challenge was obligated to take steps to ensure that the complaining employee was safe from future harassment or retaliation, and it did so. Mr. O'Brien's "biggest concern" was "protecting the employee [Ms. Sanchez]," and the two checked Mr. Sanchez's schedule against Mr. Kiliszewski's to ensure they would not encounter each other again at work until an investigation could be performed. (Tr. v.2 at 389-390).

Challenge was obligated to investigate promptly, and it did so. Ms. Compeau testified that she was directed to "immediately start an investigation" by Mr. O'Brien. (Tr. v.2 at 285). Then, she did in fact start the process immediately "[w]hen [she] got to work Monday morning," at which time she saw Mr. Napier's witness statement waiting for her. (Tr. v.2 at 285-286). Mr. Napier's statement corroborated the most shocking element of Ms. Sanchez's complaint – the allegation that Mr. Kiliszewski shouted "fuck you, bitch" at her on the shop floor. (R. Ex. 14).

Challenge was obligated to obtain a statement from the alleged harasser as soon as it reasonably could, and it did so. After attempting to talk to Mr. Kiliszewski right away, Ms. Compeau testified that she was deterred by the fact that Mr. Kiliszewski called in sick to work on Sunday night/Monday morning. (Tr. v.2 at 286). Instead, Challenge interviewed Mr. Kiliszewski immediately upon his return to work. (Tr. v.2 at 288). And during this interview, Mr. Kiliszewski admitted to many of the egregious instances of conduct described by Ms. Sanchez in her complaint. (GC Ex 3).

Challenge was obligated to conduct a thorough and fair investigation, and it did so. Ms. Compeau asked Tom Phipps to verify the authenticity of Mr. Napier's statement, and to collect a signed detailed witness statement from him containing additional background. (R Ex 14; 15; Tr. v.2 at 287). Ms. Compeau also collected statements from nine witnesses over the course of the investigation not including Ms. Sanchez's complaint or Mr. Kiliszewski's rebuttal. (R Exs. 14; 15; 17; 19; 21; 23; 25; 26; 27; and 29). These nine witnesses included all four of the five persons who remained employed at Challenge when the investigation was conducted and who Mr. Kiliszewski told Challenge that HR should speak to because they witnessed the event. (GC Ex 3; Tr. v.2 at 312).

Challenge was obligated to make a fair and fully-informed decision in light of all the evidence, and it did so. Considering the entirety of the record, Ms. Compeau recommended to Mr. O'Brien that Mr. Kiliszewski's employment should be terminated due to the "vulgar language" Mr. Kiliszewski admitted using against a female employee, the admitted "refusal to work," and Mr. Kiliszewski's "absolute[]" lack of "accountability for it" during his interview. (Tr. v.2 at 305-306). Mr. O'Brien "looked at the facts, looked at the statements that had been presented, [] looked at the interaction that [Mr. Kiliszewski] and I had that morning, [] looked at past history," and decided to follow through on Ms. Compeau's recommendation. (Tr. v.2 at 400).

In consideration of all of the above, the record is clear that Challenge responded promptly, responsibly, and reasonably when it received Ms. Sanchez's complaint about Mr. Kiliszewski. What Challenge did not do is also significant - it did not unreasonably cast doubt on the allegations of the accuser to the benefit of the accused. As Mr. O'Brien testified:

> Ultimately, what it came down to is that Norma was believable. I worked with Norma. There was never a case where Norma had

> presented anything to me that wasn't believable. Norma wasn't considered a high maintenance employee that griped a lot or did anything else. I mean she did her job every day and she was quiet, but she got her job done...
>
> [I]t was a case of it was just we couldn't continue to tolerate that type of behavior happening on our premises moving forward.

(Tr. v.2 at 400-401). Ms. Compeau said the same thing, just more directly: "I didn't believe him. I believed her... And what is going to happen if I say [to Mr. Kiliszewski] you can go back out on that floor and do the exact same thing to another female, or to this same female?" (Tr. v.2 at 306-207). Said differently, Challenge had a "good faith belief" that Mr. Kiliszewski had engaged in offensive and insubordinate conduct, which had the effect of threatening a female supervisor on the shop floor. That was a terminable offense.

Moreover, Mr. O'Brien and Ms. Compeau's conclusions about Ms. Sanchez's credibility as balanced against Mr. Kiliszewski's was borne out during their respective testimonies at the hearing. Ms. Sanchez testified plainly and without contradiction, presented a story that was entirely consistent with the written statement (R Ex 8) she submitted to Challenge a year earlier, admitted that she responded to Mr. Kiliszewski's initial aggression by "screaming" back at him because she "felt afraid" (Tr. v.2 at 243-244), and did not retreat from her story during cross-examination. Mr. Kiliszewski, on the other hand, was defensive;[34] provided contradictory testimony during direct, cross, and rebuttal examination;[35] and provided a shifting, unstable story across his many different statements.[36]

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[34] For example, Mr. Kiliszewski initially claimed he had received Ms. Sanchez's email from Larry Boyer around 11:00 PM on May 5. (Tr. v.1 at 69). The email was not written until 1:08 AM (GC Ex 3), so this is impossible. When confronted with this discrepancy, Mr. Kiliszewski testified that he did not believe the time indicated on the email was accurate even though GC Ex 3 was his own rebuttal statement and exhibit. (Tr. v.1 at 69). Additionally, Mr. Kilizewski alleged he'd never received a copy of Challenge's employee handbook, even though Challenge submitted his signed handbook receipt form into evidence. (Tr. v.1 at 98-99).

[35] For example, on direct, Mr. Kiliszewski testified that he encounter Ms. Sanchez for the first time around 10:00 PM on the night of May 5, before he was punched in. (Tr. v.1 at 35). This seems to contradict his statement (GC Ex 3), in which he responds to Ms. Sanchez's allegation that the encounter occurred at 10:00 PM by saying "didn't

Under the Board's *Wright Line* standard, "[e]ven if the General Counsel has established a prima facie case of anti-union animus, the employer may avoid liability by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the union. Thus, credible proof that a firing constituted a legitimate business decision will protect an employer from liability even in the face of a finding of anti-union animus." *Synergy Gas Corp. v. NLRB*, 19 F.3d 649, 652 (D.C. Cir. 1994) (citing *Elastic Stop Nut Div. of Harvard Indus. v NLRB*, 921 F.2d 1275, 1280 (D.C. Cir. 1990)). This is the very epitome of a case in which Challenge would have discharged any person who engaged in the conduct Mr. Kiliszewski was accused of, which he partially admitted to, and which he has never shown any remorse for. His support for the UAW has no bearing on this case. In 2018, conduct of the nature committed by Mr. Kiliszewski has no place in any workplace.

E. There is no evidence that Challenge's alleged reasons for discharging Mr. Kiliszewski are pretext for an unlawful reason in violation of the Act.

Finally, if an employer puts forth evidence establishing a business justification showing that the adverse employment action would have occurred under the second prong of the Wright Line analysis, the General Counsel must present "persuasive countervailing evidence" proving that the employer's business case is a mere pretext for discrimination. *Commercial Air, Inc.*, 362 NLRB No. 39, slip op. at 52-53; *Golden State Foods Corp.*, 340 NLRB 382, 385

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punch in until 10:17." He contradicted his testimony from direct on cross-examination, and admitted Ms. Sanchez first approached him after he punched in at 10:17 PM (Tr. v.1 at 74-75), before revising that testimony on cross and claiming that he had not punched in when Ms. Sanchez first approached him (Tr. v.1 at 101), before admitting that the timeline from GC was the "more accurate account of time." (Tr. v.1 at 103), and then finally expressing confusion about when the first conversation occurred because "it's been a year since" he wrote the written rebuttal. (Tr. v.1 at 107).

[36] One example of Mr. Kiliszewki's shifting statements occurred with respect to how many encounters he and Ms. Sanchez had during the entire night of May 5, 2017. During his direct examination, he claimed that there were four or five encounters. (Tr. v.1 at 38). On redirect, he claimed that "[i]t was two or three times" total that he and Ms. Sanchez came into conflict. (Tr. v.2 at 443). In his written statement to Challenge, Mr. Kiliszewski described two encounters between him and Ms. Sanchez. (GC Ex 3). But in his written statement to the UIA, he implies that he had only one conversation with Ms. Sanchez (R Ex 11 at 6).

(2003). An employer's reasons for discharging an employee may be pretextual if they are "false or not in fact relied upon." *United Rentals, Inc.*, 350 NLRB 951, 952 (2007).

1. Pretext is not established by the General Counsel's introduction of evidence and testimony to prove that other employees were not disciplined despite allegedly using profanity in the workplace or being insubordinate.

The General Counsel elicited testimony and produced documentation during the hearing to prove that other Challenge employees, on occasion, allegedly used profanity at work and allegedly defied the orders of their supervisors without penalty – conduct that would facially fall afoul of Challenge's employee dignity and harassment policies. (R Ex 4 at 3; 17). The purpose of this evidence, it may be surmised, was to suggest that Challenge disparately treated Mr. Kiliszewski because of his union activity, and thus to prove that Challenge's asserted reasons for discharging him were purely pretextual. The record does contain several examples of Challenge employees who swore at work or who defied a supervisor's orders without being fired. Specifically, the General Counsel introduced disciplinary records related to nine current or former Challenge employees, each of whom received some penalty less than discharge (GC Ex 19; Tr. v.2 at 343-349).

But there is no evidence that any of these employees were similarly situated. As the Sixth Circuit has held:

> [I]n the context of cases alleging differential disciplinary action, to be deemed similarly-situated, the individuals with whom the plaintiff seeks to compare his/her treatment must have [1] dealt with the same supervisor, [2] have been subjected to the same standards, and [3] have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769, 777 (6th Cir. 2016). Not only do many of the identified employees work for a different supervisor or do different jobs, the finding

that any other employee engaged in "the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct" is impossible because the record is full of testimony demonstrating that the conflict between Mr. Kiliszewski and Ms. Sanchez was unique in terms of its severity. Mr. Mathews testified that the interaction was "unusual," and "not something that commonly happens" at Challenge. (Tr. v.1 at 175). Willie Mae Walton testified that the event was "nothing something I commonly seen, no," and claimed that she had never seen anything like the interaction between Mr. Kiliszewski and Ms. Sanchez on May 5 before during her tenure. (Tr. v.1 at 195). Ms. Sanchez testified that she had never been "cussed out like that before at Challenge." (Tr. v.2 at 226). Ms. Compeau, upon reading Ms. Sanchez's email, stated that she was "shocked" by "the nature of the aggression that was used and the verbal nature, the refusal to do the work, the whole context of it." (Tr. v.2 at 285). Ron Mapes testified that if he had ever heard a maintenance person call a production employee a "bitch" he would "immediately ask for statements" and claimed he had "never received anything of the kind." (Tr. v.2 at 381). Mr. O'Brien testified that the conduct Ms. Sanchez described was "not how normal people interact with each other." (Tr. v.2 at 389).

After asking Ms. Compeau everything she could remember about each of the events that led to each employee's discipline, the General Counsel and Ms. Compeau engaged in the following dialogue during cross-examination:

> Q: So your testimony that the Employer takes such actions seriously and comes down hard on employees for cursing at supervisors or using profanity towards supervisors and team members isn't really true based upon these statements or these documents showing that people receive verbal warnings or written warnings. Isn't that correct?
>
> A: That is – that is correct.

(Tr. v.2 at 349). But, according to the record, the General Counsel is incorrect when she asserted that Challenge did not take its dignity policy seriously, no matter what Ms. Compeau may have said. This was proven by several relatively comparable examples introduced into the record by Challenge where discharge was the penalty:

Employee Name	Description of Offense	Penalty	R Ex #
Ashley Walker	Three employees complained that Ms. Walker swore at them on the shop floor. Previously, Ms. Walker had been moved to a different area in an effort to minimize conflict.	Termination: "We do not need this type of person working here."	47
Wanetta Mason	Ms. Mason was directed by her supervisor to work with a coworker "she does not like." She responded by becoming irate with her supervisor and another supervisor on the same shift, and called the co-worker a "bitch."	Termination	48
Latrice Bray	Ms. Bray had previously directed several insulting nicknames to Carla Smith, a co-worker. This was reported to HR by Jessica Sherrell, another co-worker. Ms. Bray called Ms. Smith derogatory terms related to Ms. Smith's sexual orientation. Ms. Compeau investigated and determined that Ms. Bray repeatedly violated Challenge's employee dignity policies by making abusive comments to co-workers.	Termination.	49
Brad Lyon[37]	One of Mr. Lyon's managers asked him to work a weekend shift in the presence of other co-workers. Mr. Lyon refused to work the weekend and	Terminated. During the investigation, Ms. Compeau told Mr. Lyon "we are raising the bar and that what he may have thought was acceptable behavior in the past is no longer acceptable. There is a	50

[37] Although none of the other introduced disciplinary examples involved conduct that is materially similar to Mr. Kiliszewski's conduct, Mr. Lyon's arguably comes closest. He was also discharged.

Employee Name	Description of Offense	Penalty	R Ex #
	swore repeatedly at his supervisor. Ms. Compeau investigated and gathered witness statements.	[right] way and a wrong way to ask questions and show emotions and if what I've been told is correct, he went about things the wrong way."	

Accordingly, the record shows several examples where conduct in any way analogous to Mr. Kiliszewski's also resulted in termination. It does not show that Challenge's asserted reason for discharging Mr. Kiliszewski was either false or shifting. There is also no evidence any terminated employee was involved in union activity, or that any of the employees who used profanity or who were insubordinate but whose jobs were spared abstained from union activity.

Mr. Kiliszewski also introduced testimonial evidence to suggest that two other Challenge employees had engaged in serious instances of directing profanity or abusive language at co-workers without penalty. The allegation Mr. Kiliszewski raised against Plant Manager Drew Ferris was particularly serious. (Tr. v.1 at 55). At the hearing, Mr. Kiliszewski alleged that he and other third shift employees were having a "quality meeting in the break room" six months before Mr. Kiliszewski was terminated. (*Id.*) He testified that after certain employees began speaking loudly, Mr. Ferris turned to the third-shift employees and "said shut the fuck up and get the hell out of my meeting." (*Id.*) Mr. Kiliszewski said that none of the employees who had been sworn at by Mr. Ferris bothered reporting it, because it "wouldn't matter." (*Id.*).

But absolutely no other witness ever remembered such an event. Ms. Compeau testified that she was never "aware of Mr. Ferris ever making such comments," nor had she ever received complaints to that end. (Tr. v.2 at 314). Ms. Compeau testified that:

> Q: What is your expectation about what would happen if [the incident alleged between Mr. Ferris and the safety meeting] did occur?

> A: If that were to occur and it was brought to my attention, I would [elevate to Mr. Tomko], investigate, and recommend termination.

(Tr. v.2 at 314-315). Mr. O'Brien similarly expressed surprise at the allegation, explained he had never received any report about it, did not believe it had happened, and expressed the opinion that if it had happened, Mr. Ferris "could have lost his job, easily could have lost his job." (Tr. v.2 at 404-405).

In a second instance, Mr. Kiliszewski also alleged that Jay Shearer, a first shift maintenance technician, had been "reprimanded I don't know how many times" because of abusive language he would direct towards coworkers. (Tr. v.1 at 56). When asked to cite examples, Mr. Kiliszewski could only recall one instance clearly – he claimed that in February of 2017, an "elderly lady" approached Mr. Schearer and him, and Mr. Schearer allegedly "flat out screamed, I'm not fucking doing your tip change, I'm busy right now. I'm working on something else." (Tr. v.1 at 57). Although Mr. Kiliszewski could not recall the name of the elderly employee against whom Mr. Schearer supposedly swore, Mr. Kiliszewski did remember that she went to first shift production supervisor Gary Hite to report it. (Tr. v.1 at 58). A similar but distinct allegation regarding an incident with Mr. Schearer was also reported by Mr. Leadingham during his testimony. Mr. Leadingham recalled that he received a complaint from a welder operator named Liliana Guajardo in which she accused Mr. Schearer of calling her a "bitch." (Tr. v.1 at 138). Mr. Leadingham reported that he passed the complaint along to his supervisor, Ron Mapes. (Tr. v.1 at 139).

Challenge called both Gary Hite and Ron Mapes as witnesses during the hearing, however, and both witnesses (who were sequestered) refuted Mr. Kiliszewski and Mr. Leadingham's testimony, claiming that they were unfamiliar with the alleged events and had never received any such reports concerning Mr. Schearer. (Tr. v.2 at 351-355; 379-382). Ms.

Compeau also denied that HR had ever received any reports about Mr. Schearer's allegedly abusive language directed against women. (Tr. v.2 at 315-316).

In the end, the implication of all of this evidence is that the use of profanity and harsh language – "shop talk," as the General Counsel referred to it – is a typical, everyday occurrence in Challenge's Holland facility. (Tr. v.1 at 15) ("This is no hospital or genteel setting. This is a shop floor of an automobile plant."). Such an implication contradicts testimony from multiple witnesses. Mr. Mathews agreed during cross-examination that the conflict between Ms. Sanchez and Mr. Kiliszewski on May 5 was "an unusual thing, not something that commonly happens, that type of interaction between a production supervisor and a maintenance mechanic." (Tr. v.1 at 175). Ms. Walton testified that she was "kind of startled" by Mr. Kiliszewski's interaction with Ms. Sanchez, and said that it "is not something I['ve] commonly seen, no," nor was it anything like anything she'd ever seen before. (Tr. v.1 at 195). Ms. Sanchez testified that she had "never been cussed out like that before at Challenge" prior to her run-in with Mr. Kiliszewski that night. (Tr. v.2 at 225). Mr. Kiliszewski's tirade wasn't shop talk – it was extreme and unusual conduct directed against a supervisor. And other evidence of the way Challenge treated comparable employees does not support the notion that its cited reasons for terminating Mr. Kiliszewski were pretext to conceal a motive to discriminate against him because of his union activity.

2. The fact that Challenge employees (including Mr. Kiliszewski) engaged in prior known instances of union activity without suffering any adverse action from Challenge cuts against a determination that Challenge's reasons for discharging Mr. Kiliszewski were pretextual.

The General Counsel introduced evidence and testimony into the record which proved that prior to the ratification of the 2016 Neutrality Agreement with the UAW, various attempts had been made by Challenge employees to unionize the Holland manufacturing facility.

Mr. Kiliszewski testified that he was personally involved with campaigns in 2013 and 2015. (Tr. v.1 at 18). He explained that he made no secret of his participation in these campaigns and his support for the UAW – he wore UAW shirts, put UAW stickers on his tool boxes, organized union meetings outside of work, and talked with "hundreds" of Challenge employees about the union during these prior campaigns. (Tr. v.1 at 18-24). Mr. Kiliszewski was also a signatory to a letter of intent, which was provided to the Plant 4 manager, and which indicated that he and other employees had formed a tentative bargaining committee. (GC Ex 2). Mr. Kiliszewski even testified that a Challenge supervisor attempted to surreptitiously take photos of him wearing a union shirt with a cell phone camera in 2015.[38] (Tr. v.1 at 24-25). Mr. Kiliszewski testified that Challenge's supervisors and managers all knew about his support for the UAW and his union activity. (Tr. v.1 at 20).

Mr. Kiliszewski's experience during the unsuccessful 2013 and 2015 organizing campaigns is significant because of what didn't happen as a result of them – he was never interrogated, suspended, disciplined, or discharged by Challenge, nor were his union activities interfered with in any way. Yet Mr. Kiliszewski believes that Challenge actually discharged him because of his latest slate of union activity in 2017 despite how he admitted to treating Ms. Sanchez, and despite the fact that Challenge discharged him despite having a cooperative and mutually-respectful relationship with the UAW at the time, as evidenced the 2016 Neutrality Agreement was active.

In effect, Mr. Kiliszewski is his own similarly-situated comparable employee for the purposes of the pretext analysis in this case. Mr. Kiliszewski engaged in the same union conduct in 2013, 2015, and 2017. But he was only terminated in 2017 after he swore at a supervisor and refused to follow her instructions. In light of Challenge's former lawful tolerance

[38] Challenge denies these allegations, and observes that they are also time-barred under Section 10(b) of the Act.

of his union activity, Challenge's decision to discharge him in 2017 cannot fairly be regarded as pretextual.

Similarly, Mr. Mathews testified that he also engaged in union activity and support for the UAW in 2010, 2013, 2015, and 2017. (Tr. v.1 at 152-155). Challenge also surely knew of his involvement in this regard, because Mr. Mathews was also a signatory to the 2015 letter of intent. (GC Ex 2). Nevertheless (and despite his minimal involvement in the incident which led to Mr. Kiliszewski's termination), no adverse employment action was ever taken against Mr. Mathews. (Tr. v.1 at 177). The fact that Mr. Mathews participated in similar union activity to Mr. Kiliszewski but fell far short of participating in conduct as egregious as Mr. Kiliszewski's on May 5, 2017 cuts against a finding of pretext because Mr. Mathews was not disciplined.

F. Mr. Kiliszewski's own admitted behavior removes him from protection of the Act.

As demonstrated above, Mr. Kiliszewski admitted that he told Ms. Sanchez "where's your fucking second shift maintenance" in response to her request for help, and also admits that he told her to "get the hell away from me" during the same altercation. Further, both Ms. Sanchez and a witness who wrote a contemporaneous written statement each identify that Mr. Kiliszewski shouted "fuck you, bitch" at the conclusion of the dust-up. *Pier Sixty, LLC,* at *5.

Mr. Kiliszewki's behavior went far beyond interfering with Challenge's business interests or violating the Respondent's policies. Instead, his behavior betrayed the basic, fundamental rules of human decency and civility. It made a female supervisor feel – according to her own statement and testimony – unsafe, afraid, and intimidated at work. And by bringing this unfair labor practice charge, Mr. Kiliszewski dragged Ms. Sanchez into a legal proceeding,

where she was cross-examined by the General Counsel to determine whether or not she was a liar. As Member Johnson stated in his dissent, extending protection to Mr. Kiliszewksi under the NLRA "certainly does not serve the goal of labor peace." The Board should hold that Mr. Kiliszewski lost the protections of the Act by virtue of his own demeaning and abusive conduct.

CONCLUSION

Did Ms. Sanchez grossly exaggerate what happened on May 6, 2017, when she reported the profane, aggressive, intimidating, insulting and insubordinate conduct of Mr. Kiliszewski? Did Ms. Sanchez lie under oath when she described for this Administrative Law Judge that same conduct and how it made her feel "scared" and "really bad, like really, really bad because I was just trying to do my job?" To agree with the legal positions advanced by Mr. Kiliszewski and the General Counsel and to hold that Challenge violated Section 8(a)(3) of the Act when it discharged Mr. Kiliszewski, the answers to those questions would need to be "yes." Yet, fundamentally and ultimately, no facts support that answer. Ms. Sanchez rightly, justifiably and honestly reported what happened. Mr. Kiliszewski's employment was terminated for his behavior that night - behavior that is unacceptable as a matter of law, behavior that violates Challenge's employee dignity policies, and behavior that betrays common decency in a civilized society. Mr. Kiliszewski's support for the UAW played no role in his discharge. To suggest otherwise requires not only turning a blind eye and a deaf ear to Ms. Sanchez, but also requires ignoring the irrefutable fact that Challenge is pro-union—not anti-union—as demonstrated by its extension of rights to employees and the UAW that extend far beyond that which the NLRA provides. It also necessitates ignoring the fact that because of those rights, four of Challenge's manufacturing facilities have been organized and four collective bargaining agreements have been negotiated.

In the preceding pages, Challenge has detailed the record because this is an important issue to Challenge. But, ultimately, this case is really as straightforward and as simple as set forth in this conclusion. Challenge respectfully requests that the Administrative Law Judge dismiss in its entirety the charge that has been brought against it.

Respectfully submitted,

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Dated: August 2, 2018

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

CHALLENGE MFG. COMPANY, LLC,

Respondent,

and Case No. 07-CA-199352

MICHAEL DANIEL KILISZEWSKI,

Charging Party.

_____/

CERTIFICATE OF SERVICE

The undersigned certifies that Respondent Challenge Manufacturing Company's Post-Hearing Brief was sent to the following persons via their e-mail addresses set forth below on the 2nd day of August 2018:

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